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A  
TREATISE  
OF  
MARRIAGE AND DIVORCE:

WITH THE  
PRACTICE AND PROCEDURE

IN  
Divorce and Matrimonial Causes;

THE ACTS, RULES AND REGULATIONS,  
FORMS OF PLEADINGS,  
AND  
TABLE OF FEES.

BY  
W. ERNST,

JUDGE OF DISTRICT COURTS, JAMAICA.



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## PRINCIPAL ABBREVIATIONS

### USED IN CITING THE REPORTS.

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Lee . . .	Lee's Ecclesiastical Cases.
Consist. . .	Haggard's Consistory Reports.
Phill. . .	Phillimore's Reports.
Add. . .	Addams' Reports.
Hagg. . .	Haggard's Ecclesiastical Reports.
Curt. . .	Curteis' Ecclesiastical Reports.
Roberts. . .	Robertson's Ecclesiastical Reports.
Ecol. & Adm. . .	Spinks' Ecclesiastical and Admiralty Reports.
Deane . . .	Deane & Swabey's Reports.
N. of C. . .	Notes of Cases in the Ecclesiastical Courts.
Moo. P. C. C. . .	Moore's Privy Council Cases.
H. of L. cas. . .	House of Lords Cases.
S. & T. . .	Swabey & Tristram's Reports.
L. R. P. & D. . .	Law Reports, Probate & Divorce.
L. R. Prob. Div. . .	Law Reports, Probate, Divorce and Admiralty Division.
L. R. Sc. & Div. App. . .	Law Reports, Scotch and Divorce Appeals.
L. J. P. & M. . .	Law Journal, Probate and Matrimonial.
L. J. P. D. & A. . .	Law Journal, Probate, Divorce, and Admiralty.

## INTRODUCTION.

---

*Constitution and Jurisdiction of the Court—Appellate Jurisdiction—Sittings of the Court—Sittings in Chambers—Power to make Rules—Registrars—Effect of the Judicature Acts.*

THE Court for Divorce and Matrimonial Causes owes its jurisdiction—in part original, and in part derived from the Ecclesiastical Courts—to the Act of Parliament by which it was created,<sup>1</sup> and to several Amending Acts by which that jurisdiction has been in various ways altered and amplified.<sup>2</sup>

By the first mentioned Act<sup>3</sup>—which, for the sake of distinction, will throughout this work be referred to as “the Divorce Act”—all the jurisdiction which was then vested in or could be exercised by any Ecclesiastical Court or person in England in respect of Divorces *a mensâ et toro*,<sup>4</sup> suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits and matters matrimonial, together with the jurisdiction conferred by that Act, was transferred to the Court for Divorce and Matrimonial Causes.

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<sup>1</sup> 20 & 21 Vict. c. 85, which came into operation on the first day of January, 1858.

<sup>2</sup> 21 & 22 Vict. c. 93 (the Legitimacy Declaration Act); 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 27 & 28 Vict. c. 44; 29 Vict. c. 32; 31 & 32 Vict. c. 77; 36 Vict. c. 31; 41 Vict. c. 19.

<sup>3</sup> Ss. 2, 6.

<sup>4</sup> Namely: separations “from bed and board” on the grounds of adultery or cruelty; and for which decrees for a “judicial separation” on the same grounds and having the same force and consequences, were substituted by the 7th section of the Divorce Act.

Principles  
of Ecclesi-  
astical  
Courts to  
be acted  
on.

By the 22nd section of the same Act, in all suits and proceedings other than proceedings to dissolve any marriage, the Court is to proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

Judges.

The Judge of the Court of Probate<sup>5</sup> was appointed and called the Judge Ordinary of the Court of Divorce, and was empowered to hear and determine all matters arising therein, except suits for dissolution of marriage and nullity of marriage, and certain technical matters;<sup>6</sup> but the power then for the first time given to any Court—to decree a dissolution of marriage—was in the first instance intrusted to the Judge Ordinary sitting with two other Judges of the Superior Courts; and the tribunal thus constituted was called the full Court.<sup>7</sup> Subse-

---

<sup>5</sup> Appointed under section 5 of 20 & 21 Vict. c. 77 (the Probate Act). Sir Cresswell Cresswell took his seat as Judge of the Court of Probate and Judge Ordinary of the Court of Divorce on the 12th January, 1858. On his death in 1863 he was succeeded by Sir James Plaisted Wilde, now Lord Penzance, who took his seat in the Court on the 3rd of November, 1863. On the resignation of Lord Penzance in Michaelmas Term, 1872, Sir James Hannen was appointed in his place, and is now, under the Judicature Act, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

<sup>6</sup> Divorce Act, s. 9.

<sup>7</sup> Divorce Act, s. 10. By the 8th section of that Act, the Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the senior puisne Judge for the time being in each of the three last-mentioned Courts, and the Judge of the Court of Probate, were made Judges of the Divorce Court; and by 22 & 23 Vict. c. 51, s. 1, all the Judges for the time being of Courts of Queen's Bench, Common Pleas, and Exchequer respectively were made Judges of the Court; and by s. 3, the Judge Ordinary has place and precedence in the Court next after the Lord Chief Baron of the Court of Exchequer.

quently, however, all the powers and authority of the Court were vested in the Judge Ordinary alone;<sup>8</sup> and the full Court now sits only occasionally for the purpose of hearing appeals from decisions of the Judge Ordinary in or relating to suits for judicial separation, petitions for alimony, custody of children, alteration of marriage settlements, rules for new trials, and arguments on such matters as he may deem expedient to be heard and determined with the assistance of two other Judges.<sup>9</sup>

The 12th section of the Divorce Act provides that the Court shall hold its sittings at such place or places in London or Middlesex or elsewhere as her Majesty in Council shall from time to time appoint.<sup>1</sup> The sittings of the full Court are regulated by the 4th section of 23 & 24 Vict. c. 144, which enacts that such sittings shall be holden during the seventh and five following days of sitting in each Term, and on such other days as the Judge Ordinary with the assent of the Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer shall from time to time appoint; and the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, shall, by a rota or otherwise as they deem most convenient, make provision for the attendance of the requisite number of such Judges to make with the Judge Ordinary a full Court during such sittings.

By 21 & 22 Vict. c. 108, the Judge Ordinary may sit in chambers for the despatch of such part of the business of the Court as can in his opinion with advantage to the suitors be heard in chambers; and such sittings shall

<sup>8</sup> 23 & 24 Vict. c. 144, s. 1, or, if he "deem it expedient, with the assistance of one other Judge of the Court."

<sup>9</sup> 23 & 24 Vict. c. 144, s. 2.

<sup>1</sup> The Court has always held and continues to hold its sittings in the Lord Chancellor's Court at Westminster, every week day except Mondays to hear causes, and on Tuesdays to hear motions in Court. Short undefended causes are also sometimes taken on Tuesdays.

from time to time be appointed by the Judge Ordinary, who, when so sitting in chambers, exercises the same power and jurisdiction in respect of the business to be brought before him as if sitting in open Court.<sup>2</sup> The Judge may, and usually does sit *in camerâ* to hear suits for nullity of marriage, where the matters to be disclosed are unfit for the public ear, and will do the same in any matrimonial suit which might have been determined in an Ecclesiastical Court, where the charges to be investigated are of such a nature as to make it desirable for the sake of public decency that they should be heard in private;<sup>3</sup> but he has no power to hear a suit for dissolution of marriage otherwise than in open Court.<sup>4</sup>

Rules and  
Regula-  
tions.

By the 53rd section of the Divorce Act, the Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same;<sup>5</sup> and the 54th section gives the Court full power to fix and regulate from time to time the fees payable upon all proceedings before it.<sup>6</sup>

Registrars.

The registrars and other officers of the principal registry of the Court of Probate attend the sittings of the Divorce Court, and assist in the proceedings as directed by the rules and orders;<sup>7</sup> and such registrars are invested

<sup>2</sup> Ss. 1, 3. The Judge usually sits in Chambers every Tuesday at 11 o'clock to dispose of summonses, and in Court at 12 to hear motions.

<sup>3</sup> *A. v. A.* L. R. 3 P. & D. 230; 44 L. J. P. & M. 15.

<sup>4</sup> *C. v. C.* L. R. 1 P. & D. 640; 38 L. J. P. & M. 37.

<sup>5</sup> In December, 1865, the Judge Ordinary, by virtue of the powers conferred by 23 & 24 Vict. c. 144, s. 1, revoked the then existing rules and regulations, and made the rules and regulations now in force, and which took effect on the 11th January, 1866. Several additional rules have since been made by Sir James Hannen.

<sup>6</sup> To be received, paid, and applied as therein directed, that is, by stamps, as to which, see ss. 60, 61, of the Divorce Act.

<sup>7</sup> As to the duties of the Registrars, see Rules and Regulations *passim*, in Appendix.

with and exercise with reference to proceedings in the Court for Divorce and Matrimonial Causes the same power and authority which surrogates of the official principal of the Court of Arches could or might before the passing of 20 and 21 Vict. c. 77,<sup>8</sup> have exercised in chambers with reference to proceedings in that Court.<sup>9</sup>

The Court has been but slightly affected by the Judicature Acts. By the 3rd section of the Supreme Court of Judicature Act, 1873, the Court for Divorce and Matrimonial Causes is united to the Supreme Court of Judicature; and by the 31st section, the fifth division of the High Court of Justice "shall consist of two Judges who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, and the existing Judge of the High Court of Admiralty, unless either of them is appointed an ordinary Judge of the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said Division, and subject thereto the senior Judge of the said Division according to the order of precedence under this Act, shall be President."

The Division thus constituted is called the Probate, Divorce, and Admiralty Division. By the 18th section of the Supreme Court of Judicature Act, 1875, "all rules and orders of Court in force at the time of the commencement of this Act in . . . the Court for Divorce and Matrimonial Causes . . . except so far as they are expressly varied by the first schedule hereto, or by Rules of Court made by order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be

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<sup>8</sup> The Probate Act, of which see ss. 14, 15, 16, as to the Registrars.

<sup>9</sup> Divorce Act, s. 14; 21 & 22 Vict. c. 108, s. 4.

altered or annulled by any Rules of Court made after the commencement of this Act." By order LXII of the Rules of the Supreme Court, "Nothing in these Rules shall affect the practice or procedure" in "Proceedings for Divorce or other Matrimonial Causes."

## CHAPTER I.

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*Marriage Laws of England—Proof of Marriage—Foreign and Colonial Marriages—Conflict of Marriage Laws—Effect of Foreign Divorces—English Domicil the foundation of the right to sue.*

ALL persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty.<sup>1</sup> Therefore, although it is unimportant where the marriage may have been contracted, it is in the first place requisite to the institution of any matrimonial suit<sup>2</sup> that a fact of marriage can be proved to have taken place between the parties to it, for without that there can be no matrimonial offence.

First, with respect to marriages in England. Assuming that the parties are under none of the legal disabilities—to be considered hereafter in treating of suits for nullity of marriage—all persons of the age of fourteen in males, and twelve in females may contract a marriage one with the other,<sup>3</sup> according to the forms and ceremonies

Any marriage may be the subject of a matrimonial suit.

English marriages.

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<sup>1</sup> *D'Aguilar v. D'Aguilar*, 1 Hagg. 773.

<sup>2</sup> Except a suit for jactitation of marriage, as to which, see *post* under that head.

<sup>3</sup> If either of them be under that age, the marriage is not void, but inchoate only and imperfect, and upon coming to the age of consent, they may disagree and declare the marriage void, or may agree to continue together, and then they need not be married again. Co. Litt. 79.



By the  
Estab-  
lished  
Church.

prescribed by the statutes.<sup>4</sup> The principal marriage Acts now in force are 4 Geo. IV, c. 76<sup>5</sup> and 6 and 7 Wm. IV, c. 85; and the law and practice with respect to marriages under the provisions of these acts may be most conveniently stated under the division of:—  
1. Marriages by the Established Church; and 2. Other marriages.<sup>6</sup>

Banns.

For the legal constitution of any marriage solemnized by the Established Church, it must be preceded either by the publication of banns upon three successive Sundays in the parish church or public chapel of the parish—or of each parish or chapelry, if more than one—in which the parties to be married “shall dwell;”<sup>7</sup> or it must be authorized to be had without banns by a licence from the Ecclesiastical authority,<sup>8</sup> or by a registrar’s certificate.<sup>9</sup>

Licences.

Of licences, there are two kinds: a common licence,

<sup>4</sup> Except in the peculiar cases of Quakers and Jews, who are respectively restricted to intermarrying, according to their respective peculiar usages, no marriage in England is liable to be held void on any ground connected with the religious belief or persuasion of both or either of the parties, in whatever form, by whatever person, or in whatever place it may have been solemnized.—*Report on Marriage Laws of England*, p. x. and p. xxxix.

<sup>5</sup> By which the two previous Acts, 26 Geo. II, c. 33 (Lord Hardwicke’s Act) and 4 Geo. IV, c. 17, were repealed.

<sup>6</sup> From the year 1753, the date of Lord Hardwicke’s Act, to 1836, the date of the Act, (6 & 7 Wm. IV, c. 85), which first authorized marriages in registered buildings and before a registrar, the power of solemnizing lawful marriages, when the parties were neither Quakers nor Jews, was conferred by the Legislature upon the clergy of the Established Church only, and about seven-ninths of the whole number of marriages in England are still so solemnized.—*Report on Marriage Laws*, p. vi.

<sup>7</sup> The clergyman has no express power to call for or compel any information as to the age, kindred, history, or other circumstances of parties unknown to him; except that he may, if he think fit, require from them seven days’ notice, with a statement of their names, places of abode within his parish or chapelry, and length of residence in such places of abode. 4 Geo. IV, c. 76, ss. 2, 7.

<sup>8</sup> The Divorce Act, in abolishing the matrimonial jurisdiction of the Ecclesiastical Courts and persons, expressly excepts the power of granting marriage licences. Ss. 2, 6.

<sup>9</sup> 6 & 7 Wm. IV, c. 85, ss. 1, 4; 1 Vict. 8. 22, s. 36.

which is granted by the ordinary of the place or his surrogate; and a special licence which is granted only by the Archbishop of Canterbury.<sup>1</sup>

A common licence may be obtained by any person who is prepared to make the requisite payment, and to declare on oath that one of the parties to be married has for the preceding fifteen days had his or her usual place of abode within the parish or district in the church or chapel of which the marriage is to be solemnized, and that there is no impediment of kindred or alliance or any other lawful cause known to the deponent; and if either party be a minor and has not been previously married—for widowers and widows are deemed emancipated—that the consent of the proper parent or guardian has been obtained, or that there is no person having authority to give such consent.<sup>2</sup>

A marriage founded on banns can only be solemnized in one of the churches or chapels in which the banns have been published; and a marriage by common licence, or by a clergyman under a registrar's certificate, must be solemnized in a church or chapel named in the licence or within the district of the registrar.

Every marriage by the Established Church must be celebrated by a duly ordained clergyman, and must take place between the hours of eight and twelve in the forenoon;<sup>3</sup>

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<sup>1</sup> And for which no fixed period of residence is necessary: it authorizes marriage at any hour of the day or night, and at any place whether consecrated or not. It is granted only on special grounds, and for a pecuniary payment so large as to be prohibitory to all who are not in affluent circumstances. On an average, about 12 special licences in the year are issued from the Faculty Office.—*Report on Marriage Laws*, p. vii.

<sup>2</sup> 4 Geo. IV, c. 76, ss. 10, 14, 16.

<sup>3</sup> 4 Geo. IV, c. 76, s. 21. This limitation as to time is due to the 62nd Canon:—"Neither shall any minister . . . under any pretence whatsoever join any persons so licensed in marriage at any unreasonable times, but only between the hours of 8 and 12 in the forenoon;" (1 Cardwell, *Synodalia*, p. 282); and this limitation has been extended to marriages by banns and other marriages. The forenoon may have been

and be attested by two witnesses besides the officiating minister.<sup>4</sup>

It was settled by the celebrated case of *The Queen v. Millis*,<sup>5</sup> that to constitute a valid marriage by the common law of England, it must have been solemnized in the presence of a clergyman in holy orders; and by the case of *Beamish v. Beamish*,<sup>6</sup> that a clerk in holy orders cannot effectually contract marriage without the presence of another clergyman: in other words a clergyman cannot marry himself.

Marriages  
other than  
those by  
the Estab-  
lished  
Church.

To those who prefer a purely civil ceremony—with the privilege however of superadding a religious service if they are so disposed—the law offers the alternative of marriage in the office of the superintendent registrar, or in a registered building.

The regulations made by 6 & 7 Wm. IV, c. 85, and the Acts passed for its amendment,<sup>7</sup> provide that the officer called the superintendent registrar appointed for any district under the Act 6 & 7 Wm. IV, c. 86, passed for registering births, deaths, and marriages in England, shall also be the superintendent registrar of marriages in such district; and under these Acts there are two modes of celebrating marriage: upon the certificate or upon the licence of the superintendent registrar.

Regis-  
trar's  
certificate.

One of the parties intending to marry by registrar's certificate must give notice to the superintendent registrar of the district, in which they must have dwelt for at least

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thought a fitting time, on the principle that the bride and bridegroom when they make their matrimonial vow should do so *fasting*. Hence the wedding breakfast *after* the ceremony. A proper interval might be thought necessary between the religious ceremony and the carnal consummation.

<sup>4</sup> In *Wing v. Taylor*, 2 S. & T, 278, it was held that a marriage was valid which was solemnized in a vestry belonging to and abutting on the church, and in the presence of one witness only.

<sup>5</sup> 10 Cl. & Finn. 534.

<sup>6</sup> 9 H. of L. Cas. 274.

<sup>7</sup> 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119.

seven days, or if they dwell in different districts, then to the superintendent registrar of each district, accompanied by a solemn declaration that there is no impediment of kindred or alliance, or other lawful hindrance to the marriage; and when either party—not being a widower or widow—is a minor, that the proper consent has been given, or that there is no person whose consent is required. The notice is entered by the registrar, in a book called “The Marriage Notice Book,” and which is open to public inspection at all reasonable times.<sup>8</sup>

A copy of the notice must be “suspended in some conspicuous place” in the superintendent registrar’s office during twenty-one days next after the day it was entered in the notice book, and at the expiration of that time the certificate will be issued, upon the request of the person who delivered the notice.<sup>9</sup>

When the marriage is intended to take place upon the licence of the superintendent registrar, if both parties do not dwell in the same district, notice need not be given to the registrar of each district, but only to the registrar of the district in which one of the parties resides; and the declaration must show a residence in the district for at least fifteen days next before the notice, and a licence authorizing an immediate marriage may issue on the second day after the entry in the notice book.<sup>1</sup>

The certificate or licence always specifies the place where the marriage is to be solemnized; which may either be the office of the superintendent registrar himself, or a registered building: that is, any building certified according to law as a place of religious worship, and registered as a place for the solemnization of marriage.<sup>2</sup>

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<sup>8</sup> 6 & 7 Wm. IV, c. 85, ss. 4, 5; 19 & 20 Vict. c. 119, ss. 2, 3, and Sch. A.

<sup>9</sup> 19 & 20 Vict. c. 119, s. 4.

<sup>1</sup> 19 & 20 Vict. c. 119, ss. 2, 6, 9.

<sup>2</sup> Such building must, as a general rule, be within the district, or one of the districts in which the notice was given; but the certificate or licence may authorize the solemnization of the marriage in the usual place of

When the marriage takes place in the registrar's office, it must be solemnized in the presence of the superintendent registrar: when in a registered building, in the presence of one of the registrars under his superintendence. Both in the registrar's office, and in registered buildings, the marriage must be solemnized in the presence of two witnesses, and between the hours of eight and twelve in the forenoon; and the parties must declare that they take each other as husband and wife, knowing of no lawful impediment. The addition of any kind of religious ceremony is permitted in a registered building, but prohibited in the superintendent registrar's office.<sup>3</sup>

Marriages  
of minors.

With respect to the marriages of minors, the consent of parents and guardians—subject to an appeal to the Court of Chancery in cases of unreasonable refusal—is so far required by law that the parent or guardian by publicly forbidding the banns or the solemnization, or by caveat, or by entry in the registrar's marriage notice

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worship of the parties, or in a registered building within the nearest district in which the ceremonies which they wish to adopt are used, upon special cause being shown by certain forms of declaration prescribed by 3 & 4 Vict. c. 72.

No marriage can be solemnized, under the registrar's certificate, in any church or registered place of worship without the consent of the minister of such church or place of worship. 19 & 20 Vict. c. 119, s. 11. A marriage cannot take place in a church or chapel of the Church of England upon the registrar's "licence" (6 & 7 Wm. IV, c. 85, s. 11), it being the intention of the Legislature not to interfere with the exclusive privilege in that respect vested in the Archbishop and other authorities.

<sup>3</sup> 6 & 7 Wm. IV, c. 85, ss. 20, 21. 19 & 20 Vict. c. 119, s. 12. It is by this last section however enacted, that if the parties to a marriage at the registry office, desire to add the service ordained or used for marriage by the church or persuasion of which they are members; they may present themselves for that purpose to the minister, who, on production of the certificate, and payment of the customary fees, if any, may if he shall see fit, read or celebrate such service accordingly. But he may not do so in any church or chapel of the Church of England unless he is in Holy Orders; nor shall any such reading or celebration supersede or invalidate the marriage previously contracted, or be entered as a marriage in the parish register.

book, may prevent the banns from proceeding, or the licence or certificate from issuing; or the marriage from taking place; but no proof of consent is required beyond the declarations of the parties; and the marriage of a minor, if actually solemnized without the requisite consent, is valid in law.<sup>4</sup>

No publication of banns, common or special licence, or superintendent registrar's certificate or licence is available as legal authority for the solemnization of any marriage at any time more remote than three months from the date of the last publication of banns or of the issue of the certificate or licence.<sup>5</sup>

All marriages, whether solemnized under 4 Geo. IV, c. 76, or under the more recent acts, are required by law to be registered; and marriage register books in a prescribed form, and forms for certified copies, are furnished by the Registrar-General to the clergy of the Established Church authorized to solemnize marriages, to the superintendent and subordinate registrars, and to the registering officers of the Quakers, and certified secretaries of Jewish synagogues. Every officiating minister of the Established Church, registering officer of Quakers, secretary of the husband's synagogue in the case of Jews, or civil registrar present at a marriage, is required by law to enter in these books, immediately after their celebration, all marriages solemnized by him or in his

Registration.

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<sup>4</sup> 4 Geo. IV, c. 76, ss. 8, 11, 23; 6 & 7 Wm. IV, c. 85, ss. 9, 10, 25; 19 & 20 Vict. c. 119, s. 17. A caveat, or entry of prohibition in the Registry of the Ordinary, or in a registrar's office, alleging any legal impediment to a marriage, stops the issue of the surrogate's licence or of the registrar's certificate or licence until the objection is disposed of in due course of law. In the former case, a caveat entered in the Registry of the Ordinary may be brought for adjudication before the Judge for whom the surrogate is deputy, and in the latter, the superintendent registrar may inquire into and decide upon the validity of such an objection, subject to an appeal to the Registrar-General. 4 Geo. IV, c. 76, s. 11; 6 & 7 Wm. IV, c. 85, s. 13.

<sup>5</sup> 4 Geo. IV, c. 76, ss. 9, 19; 19 & 20 Vict. c. 119, ss. 4, 9, and Sch. C.

presence, and to send duplicates or copies every three months to the superintendent registrars—or, in case of the clergy of the Established Church, to some registrar of the district, by whom such duplicates or copies are to be transmitted to the superintendent registrar—and each superintendent registrar, four times in every year, is required to transmit the duplicates or copies so sent, to the Registrar-General.<sup>6</sup>

Proof of  
marriage.

Both the ecclesiastical and civil registers are received in the Court as evidence of marriage, and are by themselves sufficient for the *primâ facie* legal proof of its due celebration. The petitioner, being now a competent witness in all matrimonial suits is usually called to give evidence, amongst other things, of the fact of marriage; and at the same time a certified extract from the Registrar-General's Office is produced as formal proof. Where, however, the petitioner is not called as a witness, the fact of marriage is established by producing the register or the certified extract, and the identity of the petitioner by a witness present at the marriage, or who knew the parties when living together as husband and wife.<sup>7</sup>

When  
celebrated  
out of  
England.

Where the marriage has taken place abroad, whether between British subjects or between foreigners, in any of her Majesty's possessions or in a foreign country, it must be proved to have been celebrated according to the forms required by the then existing law of the country in which it took place; for, as a rule, every marriage is to be deemed good or bad according to its celebration in

<sup>6</sup> See 6 & 7 Wm. IV, c. 86, ss. 30, 31, 33, 34.

<sup>7</sup> The 46th section of the Divorce Act provides that parties shall be at liberty to verify their respective cases in whole or in part by affidavit. In a suit for dissolution of a marriage which had been celebrated in Scotland, where the witnesses who could prove it resided, the Court made an order—there being no opposition—that the petitioner should be allowed to prove it at the hearing by affidavits. *M'Kechmie v. M'Kechmie*, 1 S & T. 550.

The application for such an order must be made on motion.

compliance with, or contrary to the law of the place in which it was had.<sup>8</sup>

In *Herbert v. Herbert*,<sup>9</sup> a clandestine marriage between an Englishman and a Sicilian woman celebrated at Palermo in Sicily, in 1814, and valid by the laws of that kingdom, was held valid here.

In *Abbott v. Abbott and Godoy*,<sup>1</sup> a marriage in Chili was proved by the production of a certified extract of the entry of the marriage in the register proved to be kept in Chili in compliance with the requirements of the law of Chili, and to be admissible in evidence there, upon the Court being satisfied of the identity of the parties named in the certificate, and of the curate rector who gave the certificate.

In *Rooker v. Rooker and Newton*,<sup>2</sup> the marriage was proved by evidence that the parties had lived together as man and wife, and that in the State of Virginia, where the marriage was contracted, "the mere cohabitation of a man and woman who proclaimed themselves and were received in society as man and wife constituted in the eye of the law a valid marriage."

In *Patrickson v. Patrickson*,<sup>3</sup> in proof of a marriage at Gretna Green,<sup>4</sup> a book was produced kept by the person

<sup>8</sup> *Scrimshire v. Scrimshire*; *Middleton v. Janverin*; 2 Consist. pp. 395, 437.

<sup>9</sup> 2 Consist. 263, and on appeal, 3 Phill. 58. Evidence was given by professors of the law of Sicily, that by the decree of the Council of Trent, A.D. 1563, received and obeyed as law throughout Sicily, clandestine marriages, though irregular, were valid; and that the mutual and free consent of the parties contracting marriage expressed in the presence of the priest of the parish in which one of them resided and in the presence of two witnesses was sufficient to constitute matrimony.

<sup>1</sup> 4 S & T. 254.

<sup>2</sup> 3 S & T. 526.

<sup>3</sup> L. R. 1 P. & D. 86; 35 L. J. P. & M. 48.

<sup>4</sup> The practice of contracting clandestine marriages at Gretna Green and other places in Scotland immediately after crossing the Border has been effectually suppressed by Lord Brougham's Act, 19 & 20 Vict. c. 96, under which it is necessary for the validity of any marriage contracted in Scotland that one of the parties should either have his or her usual place of residence



who professed to celebrate or to be a witness to such marriages, containing an entry stating that the parties had been married on a certain day, which was signed by the petitioner; it was also proved that the petitioner and respondent had gone from their homes at S. together, stating that they intended to get married at G.; that they had returned to S. and stated that they had been married at G.; and that they afterwards cohabited for many years at S. as husband and wife. No other evidence being procurable, the marriage was held to be sufficiently proved.<sup>5</sup>

Marriages  
in the  
British  
colonies.

The common law of England, as it stood previously to Lord Hardwicke's Act, was carried to the British colonies, where it was not altered by that Act, and therefore still prevails unless modified by Imperial statute or by the local legislatures with the sanction of the Crown.<sup>6</sup>

In *Coode v. Coode*,<sup>7</sup> a marriage at Barbados in 1823 was proved by the testimony of the captain of the vessel to which the husband belonged, that he was aware of the intention of the parties to marry; that he wrote to the Governor to obtain a special licence for their marriage, and that after the marriage was supposed to have taken place, they returned to the ship as man and wife, and

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in Scotland at the date of the marriage, or have lived in Scotland for twenty-one days next preceding such marriage.

For the law of marriage in Scotland see *Yelverton v. Yelverton*, 4 Macqueen's H. of L. Cas. 745.—*Report on Marriage Laws*, p. xvi.

<sup>5</sup> *Semper presumitur pro matrimonio*; and therefore cohabitation as man and wife creates a strong impression in favour of marriage where the woman's character is unblemished, because the law does not suppose that a woman whose character in general is virtuous would live with a man as her husband who is not so. See *Conran v. Lowe*, 1 Lee's Eccl. Cas. p. 638.

<sup>6</sup> *Countess of Limerick v. Earl of Limerick*, 4 S. & T. 252, where a marriage in Norfolk Island in the year 1842 was held to be sufficiently proved by evidence of its having been solemnized in a room by a clergyman of the Church of England according to the rites and ceremonies of that Church.

<sup>7</sup> 1 Curt. 755.

were so treated. A collated copy of an entry in the marriage register, kept in pursuance of a law of the island, was also produced, and received as evidence.

The presumption of the law is always in favour of the validity, and against the nullity of marriage; and therefore no words in a marriage Act will be held to import a nullity, unless they expressly create a nullity. In *Catterall v. Catterall*,<sup>8</sup> a marriage had in New South Wales, in 1834, before a Presbyterian minister, where there was a fact of consent between the parties to become husband and wife, was held to be a valid marriage, although certain provisions in a local marriage Act had not been complied with, there being no words in that Act constituting a nullity.

So in *Ward and Codd v. Dey*,<sup>9</sup> a marriage between British Protestant subjects domiciled at Demerara, solemnized at the Island of St. Lucia according to the rites and ceremonies of the Church of England, by a priest in holy orders of that Church, in the parish church of which he was the minister, without the formalities required by the general law of the island, under a licence from the Governor, was held, upon the evidence of persons skilled in the law of the island, to be in conformity with the *lex loci*, and therefore valid.<sup>1</sup>

Marriages between British subjects in India were Marriages  
in India.

<sup>8</sup> 1 Roberts. 304, 580.

<sup>9</sup> 1 Roberts. 759; 7 N. of C. 96.

<sup>1</sup> Various acts having been passed by the legislatures of divers of Her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein; it was enacted by 28 & 29 Vict. c. 64, that every law made or to be made by the legislature of any of Her Majesty's possessions abroad for the purpose of establishing the validity of any marriage previously contracted in such possession shall have and be deemed to have had from the date of the making of such law, the same force and effect within all parts of Her Majesty's dominions, as such law may have had or may hereafter have within the possession for which the same was made: provided, that no marriage shall be thereby made valid unless at the time of such marriage the parties thereto were competent to contract the same according to the law of England.

formerly governed by the English law as it existed previously to Lord Hardwicke's Act; and notwithstanding the decision in *The Queen v. Millis* in 1844,<sup>2</sup> the Supreme Court of Bombay in 1849 held that a marriage celebrated between British born subjects, members of the Church of England, at Surat by an Independent Missionary not in holy orders was a valid marriage.<sup>3</sup> But now, marriages in India of persons professing the Christian religion are regulated by 14 & 15 Vict. c. 40, and by the Indian Acts passed for giving effect to its provisions.

Marriages  
of British  
subjects in  
foreign  
countries.

All marriages of British subjects in foreign countries are recognized as valid, except in cases where the parties would not be competent by the law of England to contract a valid marriage. Where, however, it was not possible for a British subject in a foreign country professing a religion essentially different to avail himself of the forms of the *lex loci contractus*, the marriage of a British subject within the limits of a trading company or the hotel of an ambassador solemnized according to the law of England as it existed before Lord Hardwicke's Act has always been upheld as valid by the English Courts.

And upon the same principle, the marriage of a British subject solemnized in like manner within the lines of a British army serving abroad, was held to be valid. But this latter class of marriages was not judicially recognized until Lord Stowell's decision in *Ruding v. Smith*,<sup>4</sup> in favour of a marriage solemnized by the chaplain of the English forces in occupation of the Cape of Good Hope, between two British subjects in a private house; and in order to remove all doubts respecting the three classes of marriages above mentioned, it was enacted by 4 Geo. IV,

<sup>2</sup> 10 Cl. & Finn. 534.      <sup>3</sup> *Maclean v. Cristall*, 7 N. of C. Suppt. xvii.

<sup>4</sup> 2 Consist. 371. The marriage in question was in 1796; the Cape having surrendered to the British forces about a year before. Lord Stowell's decision was in 1821.

c. 91, that all marriages solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the Court of which he is accredited, or in the chapel of a British factory abroad, or in the house of any British subject residing in such factory, and all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad,<sup>5</sup> shall be deemed as valid in law as if they had been solemnized within the British dominions in due form of law.<sup>6</sup>

In order to afford greater facilities for the marriages of British subjects in foreign countries, it is provided by Consular Marriage Act, 1849. 12 & 13 Vict. c. 68, that—both or one of the parties to the marriage being subjects or a subject of this realm—any British Consul-General, Consul, Vice-Consul, or Consular Agent, specially authorized in writing under the hand of one of Her Majesty's principal Secretaries of State, may, on receiving due notice, grant a licence for the marriage, and at the expiration of seven days, if the marriage is by licence, or twenty-one days if without licence, after the notice has been given, may allow its solemnization in his presence according to the rites of the Church of England, or according to such other form and ceremony as the parties may choose to adopt; or, if so desired, may personally solemnize the marriage: provided always, that such marriages shall be solemnized at the British Consulate, with open doors, between the hours of eight and twelve in the forenoon, in the presence of two or more witnesses, and that where such marriage is

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<sup>5</sup> Though there may be no actual hostility at the time. See *The Waldegrave Peerage Case*, 4 Cl. & Finn. 649.

<sup>6</sup> Although nothing is expressed in this statute with respect to marriages where one of the parties only is British, there are no words of exclusion. In *Lloyd v. Petitjean*, 2 Curt. 251, a marriage between an Englishman of full age and a Frenchwoman at the hotel of the British Ambassador at Paris, was held valid under this Act.

not solemnized according to the rites of the Church of England, in some part of the ceremony, and in presence of the Consul and the witnesses, each of the parties shall solemnly declare that they know not of any lawful impediment to their marriage, and shall call the parties present to witness that they take each other respectively to be lawful husband and wife.<sup>7</sup>

Consular  
Marriage  
Act, 1868.

And the amending Act, 31 & 32 Vict. c. 61, confirms certain marriages—both or one of the parties being subjects or a subject of this realm—solemnized by any person acting in the place of the British Consul at certain places in China and elsewhere, and provides for the legality of such marriages in future.

#### CONFLICT OF MARRIAGE LAWS.

Lex loci  
contractus.

Although the general rule is that a marriage valid according to the law of the country where it is celebrated, whatever that law may be, is good everywhere, its validity must in some cases depend upon the law of the domicile of the parties contracting. With respect, therefore, to the marriages of British subjects in foreign

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<sup>7</sup> The 20th section confirms certain past marriages, as to the validity of which doubts might be entertained as not being within the scope of 4 Geo. IV, c. 91. And also the following Acts: 4 Geo. IV, c. 67, to render valid marriages had at *St. Petersburg* in the chapel of the Russia Company and in private houses whether both or one of the parties be British subjects; 3 & 4 Wm. IV, c. 45, to declare valid marriages solemnized at *Hamburgh* since the abolition of the British factory there; 5 Geo. IV, c. 68, with respect to the celebration of marriages in *Newfoundland*; 17 & 18 Vict. c. 88, to render valid certain marriages of British subjects in *Mexico*; 21 & 22 Vict. c. 46, confirming marriages solemnized in the chapel of the Russia Company at *Moscow*; and certain marriages solemnized at *Ningpo* and *Tahiti*; 22 & 23 Vict. c. 64, confirming marriages in the British chapel at *Lisbon*; 30 & 31 Vict. c. 93, confirming marriages solemnized by the chaplain of the Saint John Del Rey Mining Company at *Morro Velho in Brazil*; 30 & 31 Vict. c. 2, declaring valid certain marriages solemnized at *Odessa*.

countries : while the forms of entering into the contract of marriage are to be regulated according to the *lex loci contractus*, the law of the country in which the marriage is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. <sup>Lex domi-  
cili.</sup>

The forms of celebrating the foreign marriage may be different from those required by the law of the country of the domicile, yet the marriage may be good everywhere; but, in the case of domiciled British subjects, if the foreign marriage be essentially contrary to, and is declared void by the law of England, it will be regarded as invalid here though not contrary to the law of the country where celebrated.<sup>8</sup>

Persons cannot evade the law of their domicile by fraudulently going into another country to do that which by the law of their own country is forbidden.<sup>9</sup> A marriage therefore contracted by domiciled British subjects in another country is not to be held valid if, by contracting it, the laws of their own country are violated. In *Brook v. Brook*,<sup>1</sup> the question was whether a marriage contracted between Wm. Leigh Brook, a widower, and the sister of his deceased wife, in Denmark—such marriages being there lawful—was valid in England, both parties to it being at the time it was contracted native born English subjects domiciled in England, and only on a temporary sojourn in Denmark. It was held that the 5 & 6 Wm. IV, c. 54,<sup>2</sup> affects all domiciled English

<sup>8</sup> *Harford v. Morris*, 2 Consist. 423.

<sup>9</sup> Huberus puts this case ; “ *Brabantus uxore ducta dispensatione Pontificis in gradu prohibito, si huc migret, tolerabitur ; at tamen si Frisius cum fratrís filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus ; quia sic jus nostrum pessimis exemplis eluderetur.*” *Praelectiones Juris Civilis*, lib. I. tit. III. : de confl. legum, 8.

<sup>1</sup> 9 H. of L. 193.

<sup>2</sup> Which enacted, s. 2, that “all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity

subjects wherever they may be transiently resident, and that the marriage was therefore void.

The provisions of this Act and the principles above laid down have been held to apply equally to a naturalized English subject.

In *Mette v. Mette*,<sup>3</sup> a native of Marburg, in the electorate of Hesse Cassel, came to England at the age of thirteen, and though he paid occasional visits to Germany, remained domiciled, and carried on his business in England, and was ultimately naturalized by Act of Parliament. His wife having died, he went to Frankfort, and there was married to a sister by the half-blood to his former wife, such marriage being valid by the law of Frankfort, and soon after returned to England, where he remained until his death. It was held that his second marriage was void, and that it had not the effect of revoking his will formerly made.

The law of foreign marriages as above laid down applies only to domiciled British subjects having a temporary residence in, or resorting to a foreign country to evade the laws of their own. A marriage valid by the law of the country where celebrated between foreigners or between British subjects *bonâ fide* domiciled in such foreign country, might, upon their afterwards acquiring an equally *bonâ fide* domicile in England, properly become the subject of a matrimonial suit in the English Matrimonial Court.

**Polygamy.** Marriage, however, as conferring the status of husband and wife recognized throughout Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others. A marriage contracted in a country where polygamy is lawful between a man and woman who profess a faith which allows polygamy is not

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or affinity should be absolutely null and void to all intents and purposes whatsoever."

<sup>3</sup> 1 S. & T. 416.

a marriage as understood in Christendom; and though it may be a valid marriage according to the *lex loci*, and at the time when it was contracted, both the man and woman were competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations.<sup>4</sup>

The same rule of law, that the validity or invalidity of a marriage must be decided by the law of the country where it is solemnized, applies to marriages contracted by foreigners in England; and though they may not have complied with the *forms* imposed upon them by the law of the country of their domicile; if the marriage is good according to the law of England, it will be upheld by the English Courts.

In *Simonin v. Mallac*,<sup>5</sup> the parties being natives of, and domiciled in France, came to London, and were married by licence at the parish church of St. Martin-in-the-Fields, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects in foreign countries. The marriage was not consummated, and they returned to France the next day. The man refused to celebrate the marriage according to the French law, and the woman instituted a suit for nullity in the French Courts, which the man did not defend, and a decree of

<sup>4</sup> In *Hyde v. Hyde and Woodmansee*, L. R. 1 P. & D. 130; 35 L. J. P. & M. 57, the marriage was contracted in the territory of Utah according to the ceremonies of the Mormons, both parties being single at that time. The petitioner, who was an Englishman by birth, having renounced the Mormon faith, returned to England. The woman refused to follow him, and subsequently contracted a second marriage. His petition for dissolution of marriage was dismissed.

And see Lord Brougham's judgment in *Warrender v. Warrender*, 2 Cl. & Finn, pp. 531, 532.

<sup>5</sup> 2 S. & T. 67.



nullity was pronounced. The woman afterwards came to reside in England, and petitioned for a decree of nullity in this Court: the man was served with a citation in Naples, but did not appear. It was held that the contract having been entered into in this country, the personal status resulting from such contract was to be ascertained by the law of this country, and not any special law of the country of the domicile of the parties to the contract; and the petition was dismissed.

But, on the other hand, the personal capacity to contract marriage must depend upon the law of the domicile of the persons contracting, and not upon the law of the country in which they may be temporarily resident.

In *Sottomayer* otherwise *De Barros v. De Barros*,<sup>6</sup> the parties to the marriage were Portuguese subjects, and first cousins, and came to reside in England in 1858. In 1866, they went through a form of marriage before the registrar of the district of the City of London. In 1873, they returned to Portugal, and continued to reside there. In 1874, the wife filed a petition for a decree of nullity of marriage by reason of consanguinity. Evidence was given that by the law of Portugal, a marriage between Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid. Sir Robert Phillimore held that the Court of the place of the contract of marriage is not bound to recognize the incapacities affixed by the law of the domicile on the parties to the contract when those incapacities do not exist according to the *lex loci contractus*, and to pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity; and therefore dismissed the petition. On appeal,<sup>7</sup> the Lords Justices reversed this decision, and pronounced the marriage null and void, Cotton, L. J., in his judgment, observing:—"The law of a country where

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<sup>6</sup> L. R. 2 Prob. Div. 81; 46 L. J. P. D. & A. 43.

<sup>7</sup> L. R. 3 Prob. Div. 1.

a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

This decision rests upon the principle laid down in *Brook v. Brook*, and is to be distinguished from *Simonin v. Mallac*, inasmuch as in that case the forms only, and in this, the essentials of the marriage law were violated.

A very important conflict of law arises when doubts are raised respecting the validity of a marriage contracted by persons whose first marriage has been dissolved by a foreign or colonial Court. The recognition by the English Courts of a foreign divorce of an English marriage may be considered to depend: first, upon the domicile of the parties at the time of such divorce; secondly, upon the sentence having been pronounced upon a ground of divorce recognized by the English law.

Foreign  
divorces of  
English  
marriages.

In *Lolley's case*,<sup>7</sup> a domiciled Englishman having been married in England, and while still domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, was convicted

<sup>7</sup> 2 Cl. and Finn. 567; Russ. & Ry. C. C. 237. See this case very fully commented upon in *Shaw v. Gould*, L. R. 3 H. of L. at pp. 71, 75, 85, 93.

of bigamy in England, and held by all the judges to have been rightly convicted because the sentence of the Scotch Court dissolving his marriage was a nullity.<sup>8</sup>

The question has since been the subject of very elaborate discussion in a series of cases<sup>9</sup> in which nice

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<sup>8</sup> So in *Conway v. Beasley*, 3 Hagg. 369. B. in 1810 married Miss R. in London. In 1823, they were divorced by the Commissary Court at Edinburgh, and in 1824, B. contracted a second marriage at Edinburgh with Miss C. The first wife died in 1830, and in 1831, the second wife petitioned for a degree of nullity on the ground of bigamy. The Court pronounced the second marriage null and void on the ground that neither of the parties to the first marriage were at any time *bonâ fide* domiciled in Scotland.

<sup>9</sup> *Warrender v. Warrender*, 2 Cl. & Finn. Sir George Warrender, born and domiciled in Scotland, married an Englishwoman in England, but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which the wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit in the Court of Session against his wife on the ground of her adultery committed on the Continent of Europe. It was objected that the Scotch Court had no jurisdiction to dissolve the marriage, and *Lolley's* case was relied upon. But it was held that as Sir G. Warrender was at the time of his marriage a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, and that as no other domicile could be legally ascribed to the wife, both parties were domiciled in Scotland, and that the Scotch Court had therefore jurisdiction to entertain the suit.

The distinction between *Lolley's* case and *Warrender v. Warrender* being clearly that in the former, the man's domicile was English and English only, whereas Sir G. Warrender never for a moment abandoned his Scotch domicile.

In *Dolphin v. Robins*, 7 H. of L. 390, a domiciled Englishman married an Englishwoman in England. Having separated by consent, the husband went to Scotland, but without any apparent intention of permanent residence, and there committed adultery. When he had been there about six months, the Court of Session, at the suit of his wife, made a decree dissolving their marriage. It was held that the husband by his residence in Scotland did not acquire a Scotch domicile, and that his marriage was not dissolved by the Scotch decree of divorce.

In *Pitt v. Pitt*, 4 Macqueen's H. of L. cas. 627, the husband having, in 1854, gone to Scotland to evade his creditors, ultimately took a shooting lodge there for six years; but in his correspondence always expressed an anxious desire to return to England. In 1860 he instituted a suit for dissolution of marriage in Scotland on the ground of his wife's adultery in

distinctions have been drawn; but the result of the decisions may be thus summed up: that in accordance with *Lolley's* case, which has never been overruled, the Scotch Courts have no power to dissolve an English marriage, when the parties are not really domiciled in Scotland, but have only gone thither for such a time as according to the Scotch Courts gives them jurisdiction in the matter; and applying the principle of that decision more broadly, that an English marriage between English subjects cannot be invalidated by a foreign divorce when the parties are not domiciled in the country by whose tribunals the divorce is granted. Whether if so domiciled the English Courts would recognize and act upon such divorce is not yet free from doubt, but the better opinion appears to be that they would do so if the divorce were founded upon a ground of divorce recognized as such in this country, and it certainly seems only just that persons who have permanently taken up their abode in a foreign country should be allowed to resort to the tribunals of the country they have adopted instead of being forced back upon the law of their original distant domicil.

Result of  
the deci-  
sions.

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England, she never having joined him in Scotland. On appeal from the Scotch Court on the question of its jurisdiction to entertain the suit, it was held that the husband had never abandoned his English domicil, or acquired such a domicil in Scotland as to give the Scotch Court jurisdiction.

So in *Shaw v. Gould*, L. R. 3 H. of L. 55, where the husband, being a domiciled Englishman, having no connection with Scotland, went there for the purpose of giving the Scotch Court jurisdiction in a suit for divorce at the instance of his wife; the same doctrine was held, and the previous cases were very fully commented upon and explained.

Again, in *Shaw v. The Attorney General*, L. R. 2 P. & D. 156; 39 L. J. P. & M. 81, the Court refused to recognize a divorce obtained by an Englishwoman in America, her husband having throughout remained domiciled in England.

On the other hand, in *Argent v. Argent*, 4 S. and T. 52; 34 L. J. P. & M. 133, where a marriage, divorce, and second marriage took place between parties domiciled during the whole time at the Cape of Good Hope, the second marriage was held valid.

ENGLISH DOMICIL, THE FOUNDATION OF THE  
RIGHT TO SUE.

Domicil in  
England.

Although the jurisdiction of the Court is not, by the Divorce Act confined to England, the power of the Court to entertain a matrimonial suit may be called in question, either when the parties are not English subjects, or are not *bonâ fide* domiciled,—that is, permanently resident—in England at the time of instituting the suit.<sup>1</sup> “The Court is a Court for England, not for the United Kingdom, and for the purposes of this question of jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain.”<sup>2</sup>

The Court is not itself disposed to limit or define its jurisdiction, and will not allow a respondent who appears absolutely or submits without protest in the first instance to the jurisdiction of the Court, to amend that appearance, and enter an appearance under protest. A respondent, therefore, who has entered an appearance cannot file an answer pleading to the jurisdiction only, but must answer to the merits, and may then at the same time allege facts raising the question of the jurisdiction;<sup>3</sup> and the domicile which no doubt ought to be English in order to found the suit, is then to be determined as a question of fact.

<sup>1</sup> The law of domicile, as here stated, must be understood as restricted to its bearings on matrimonial suits.

<sup>2</sup> *Yelverton v. Yelverton*, 1 S. & T. 586.

<sup>3</sup> *Zycklinski v. Zycklinski*, 2 S. & T. 420; 31 L. J. P. & M. 37, where the respondent pleaded to the jurisdiction after appearing absolutely, and it was held that he was no longer in a position to avail himself of such a plea, but must answer to the merits. So in *Forster v. Forster & Berridge* 3 S. & T. 144, it was held that the respondent who had appeared absolutely by attorney and not in person or under protest, must file an answer. So also in *Garstin v. Garstin*, 4 S. & T. 73; 34 L. J. P. & M. 45.

By Rule 22, If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and

But though a respondent may appear without protest, and answer on the merits, and upon the facts disclosed at the hearing it turns out that the Court has no jurisdiction, it by no means follows that It will therefore go on and make a decree.<sup>4</sup> Assuming, however, that the parties are English subjects or are domiciled in England, it matters little where the offence which forms the subject of the suit was committed, or where the parties resided at the time of such offence.<sup>5</sup> *Primâ facie*, at least, the husband's actual and the wife's legal domicile are presumed to be one wheresoever the wife may be personally resident;<sup>6</sup> and therefore, even if he has been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she cannot, on that ground, acquire a separate domicile for herself.

In *Yelverton v. Yelverton*,<sup>7</sup> a suit by the wife, at that

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within eight days file in the Registry his or her act on petition\* in extension of such protest, and on the same day deliver a copy thereof to the Petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

See *Wilson v. Wilson & Howell*, 40 L. J. P. & M. 77, and on appeal, 41 L. J. P. & M. 1.

<sup>4</sup> *Deck v. Deck*; *Bond v. Bond*; *Brodie v. Brodie*; 2 S. & T. 90, 93, 259; *Wilson v. Wilson & Howell*, 40 L. J. P. & M. 77. In this case the respondent filed an answer merely denying the jurisdiction of the Court, and the answer was ordered to be struck out unless the respondent amended it within a certain time by answering to the merits. She then entered an appeal, notwithstanding which, the Court directed the mode of hearing of the petition. L. R. 2 P. & D. 292; 40 L. J. P. & M. 58.

<sup>5</sup> *Ratliffe v. Ratcliffe & Anderson*, 1 S. & T. 467, where the marriage and adultery took place in India, and the petitioner and co-respondent were English officers quartered in India.

<sup>6</sup> *Chichester v. Donegal*, 1 Add. 19; *Whitcomb v. Whitcomb*, 2 Curt. 351. But the presumption fails when the wife has obtained a judicial separation. *Williams v. Dormer*, 2 Roberts. 505, where a divorce *a mensâ et toro* having been pronounced at the suit of the wife, the husband subsequently petitioned for nullity of marriage, but the case went no further.

<sup>7</sup> 1 S. & T. 574.

\* As to proceedings by act on petition, see Rules 56 to 61, and Form No. 9 in Appendix.

time resident in England, for restitution of conjugal rights—the husband was born in Ireland of Irish parents, and when a minor received a military education in England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there, he married the petitioner in Scotland, cohabited with her there and in France, where he quitted her, returned to Edinburgh, and refused again to live with her. It was held that as there was no proof of his having acquired an English domicil, and the petitioner's domicil was that of her husband, the Court had no jurisdiction to entertain the suit.<sup>8</sup>

On the other hand, a natural born English subject, whose domicil of origin is English, cannot by a change of domicil shake off his allegiance to the Crown, nor render himself less liable to be affected by the laws of England. In *Deck v. Deck*,<sup>9</sup> the petitioner, an Englishwoman, was married to the respondent, a natural born English subject, in England. He afterwards left her, acquired a domicil in America, and there committed bigamy and adultery. The Court dissolved the marriage.

Again, in *Bond v. Bond*,<sup>1</sup> the petitioner, an Englishwoman, was married to the respondent in England: they lived first at Clifton, then at the house of the respondent's father in Ireland, then in London. They afterwards went again to Ireland, but returned to England, bringing with them a woman servant, who shortly afterwards returned to Ireland, and the respondent went there also. In the same year, the petitioner went to Ireland to her husband, who was then living at a place called Grange Hall. She found that he was living in open adultery with the woman servant: he treated his wife with great

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<sup>8</sup> The alleged legal fiction that he was supposed to be present at the head-quarters of the regiment of Artillery in which he had a company as founding his English domicil, was rejected.

2 S. & T. 90.

<sup>1</sup> 2 S. & T. 93.

cruelty, and she returned to England. On her petitioning on the grounds of adultery and cruelty, the Court held that there was no evidence of so conclusive a nature as to compel It to deal with the respondent as an Irishman, and dissolved the marriage.

The *bonâ fide* settled residence of the husband, though a foreigner in England, is sufficient to found the jurisdiction of the Court against the wife who has committed adultery abroad. In *Brodie v. Brodie*,<sup>2</sup> the petitioner, a Scotchman by birth, went to Australia, and there married and settled. A separation by mutual consent took place in consequence of a quarrel, and a deed was entered into under which the petitioner made his wife an allowance. He then returned to England with his children, and after residing in various places, ultimately bought the lease of a house in London. Evidence was given that after he became resident in England, his wife had been carrying on an adulterous intercourse in Australia. The Court held that he was entitled to a dissolution of his marriage.

Foreigner  
resident in  
England.

Again, in *Wilson v. Wilson*,<sup>3</sup> the parties were Scotch; the marriage took place in Scotland; and they cohabited there until the petitioner discovered his wife's adultery. He thereupon, in 1866, broke up his home, and removed to England; and in 1871, instituted a suit for dissolution of his marriage on the ground of the adultery committed in Scotland. He was a sleeping partner in a business carried on in Scotland; he had a shooting place there; and continued his subscription to a club in Glasgow. In his examination he swore that he had left Scotland with the intention of taking up his permanent abode in England. It was held that he had abandoned his Scotch domicile and acquired an English domicile.

But on the other hand, mere residence is not sufficient; it must be *bonâ fide*, not casual or as a traveller. In

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<sup>2</sup> 2 S. & T. 259.

<sup>3</sup> L. R. 2 P. & D. 435; 41 L. J. P. & M. 74.



*Manning v. Manning*,<sup>4</sup> a suit by the husband, whose domicile was Irish, for judicial separation on the ground of the wife's desertion, the wife appeared under protest, and pleaded to the jurisdiction: the husband made an affidavit stating that he was permanently settled in England, and had taken a place of business in London, and had no intention of returning to reside in Ireland. It appeared, however, that in this place of business there was no apartment for residence, and that he could put an end to the lease at any time upon either a six or twelve months' notice. The Court held that he was not *bonâ fide* resident in England in the sense of the decision in *Brodie v. Brodie*, and dismissed his petition.

On the principle already stated, that the domicile of the husband is the domicile of the wife, a woman cannot, merely by living apart from her husband, acquire such a domicile as to give the Court a jurisdiction it does not otherwise possess.

In *Le Sueur v. Le Sueur*,<sup>5</sup> the parties were domiciled in Jersey, where they were married, and where they cohabited, until the husband deserted his wife, and went to the United States of America. He was there served with the petition and citation at the suit of the wife, who had settled herself in England, for a dissolution of marriage on the grounds of his adultery committed in Jersey, and desertion. The Court held that It had no jurisdiction over the husband, and dismissed the suit.

The law respecting domicile of origin and domicile of choice was well-considered in the cases of *Bell v. Kennedy* and *Udny v. Udny*.<sup>6</sup> From these cases I have extracted the following principles:—That the personal *status* indicated by the term, domicile of birth, or domicile of origin, clings and adheres to the subject of it, until an actual

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<sup>4</sup> L. R. 2 P. & D. 223 ; 40 L. J. P. & M. 18.

<sup>5</sup> L. R. 1 Prob. Div. 139 ; 45 L. J. P. D. & A. 73.

<sup>6</sup> L. R. 1 Sc. & Div. App. 307 and 441.

change is made by which the personal *status* of another domicil is acquired ; That no man shall be without a domicil, and, therefore, the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate, and the domicil of the mother if illegitimate ; and this is the domicil of origin, and is involuntary ; That other domicils, including domicil by operation of law as on marriage, are domicils of choice ; That when another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice : but as the origin of domicil is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice ; That domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness ; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation ; That residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi*, can be inferred, the fact of domicil is established ; That domicil of choice, as it is gained *animo et*

*facto*, so it may be put an end to in the same manner ; And that if a man, having acquired a domicil of choice, abandons it, and is journeying towards, or is in search of a new domicil, his domicil of origin reverts to him from the moment the other is given up, and until the new domicil is acquired.

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## CHAPTER II.

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### *General Procedure in all Suits—Minors; Lunatics; Paupers—Protection of Deserted Wife's Property.*

THE proceedings in any suit are commenced by filing a petition,<sup>1</sup> which must be accompanied by an affidavit<sup>2</sup> and made by the petitioner, verifying the facts within the petitioner's personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition;<sup>3</sup> and such affidavit is to be filed with the petition; and where the suit is for dissolution of marriage or judicial separation, or for a decree of nullity of marriage, or a decree in a suit of jactitation of marriage, the affidavit is further to state that no collusion or connivance exists between the petitioner and the other party to the marriage.<sup>4</sup> This verifying affidavit must not be headed in the cause, but merely "In the matter of the petition of ———."<sup>5</sup> In form, it should only repeat the statements in the petition, and is of no further use in the cause than to

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<sup>1</sup> Rule 1. See Forms of Petitions in Appendix.

<sup>2</sup> See Rules as to affidavits, 138 to 146 in Appendix.

<sup>3</sup> For instance, a wife petitioning on the grounds of cruelty and adultery may swear positively as to the cruelty, but as to the adultery, that she is informed and verily believes, &c. See Form of Verifying Affidavit in Appendix.

<sup>4</sup> Divorce Act, S. 41, Rules 2, 3; and Rule 175, as to the affidavit to be filed with a Petition for restitution of conjugal rights.

<sup>5</sup> *Gapp v. Gapp & Leverson*, 4 S. & T. 273; *Steed v. Steed*, L. R. 1 P. & D. 364; 36 L. J. P. & M. 50.

Citation  
and  
Service.

show that the petitioner is proceeding in good faith.<sup>6</sup> The petition having been filed, the next step is to extract a citation,<sup>7</sup> which, together with a certified copy of the petition under seal of the Court, to be obtained from the Registry,<sup>8</sup> must be personally served on the parties cited when that can be done by personally delivering a true copy of the citation, and producing the original if required.<sup>9</sup> But it is provided that the Court may dispense with such service altogether, or direct some other service to be substituted where it is necessary or expedient to do so;<sup>1</sup> and therefore, if after all reasonable efforts, personal service cannot be effected, application may be made on motion,<sup>2</sup> supported by affidavits, to the Judge Ordinary, or in his absence, to the Registrars, to substitute some other mode of service,<sup>3</sup> and if it is satisfactorily shown that personal service "either within or without Her Majesty's dominions" is practically impossible,<sup>4</sup> by reason of the respondent's whereabouts not being in any way

<sup>6</sup> *Deane v. Deane; Forster v. Forster & Evans*, 1 S. & T. 90, 167. Care must be taken to spell the names of the respondents accurately, as in the event of a misnomer re-service of the petition or citation, as the case may be, may be necessary. *Cotton v. Cotton & Kinnis*, 4 S. & T. 275; *Kisch v. Kisch*, 33 L. J. 115. But a respondent who takes no steps in the course of the suit to set such a mistake right cannot ultimately take advantage of it to invalidate the proceedings. See *Churchill v. Churchill & Abbott*, L. R. 1 P. & D. 485; 37 L. J. P. & M. 41, where a writ of attachment had been suspended on the application of Mr. William Braine Abbot, on the ground that all the proceedings had been served on him in the name of William Abbott.

<sup>7</sup> Rules 8, 9, and Forms of Citation and Præcipe, Nos. 2 and 3 in Appendix.

<sup>8</sup> See Rules 118 to 120, as to Office Copies.

<sup>9</sup> Divorce Act, s. 42. Rules 10, 11, 12. Acceptance of service by an attorney will not suffice. *Milne v. Milne*, 4 S. & T. 183.

<sup>1</sup> Divorce Act, ss. 33, 42.

<sup>2</sup> See Rules as to motions, 147 to 150 in Appendix. All motions to the Judge Ordinary must be made in Court.

<sup>3</sup> Rule 13.

<sup>4</sup> But not otherwise, as in *Rowbotham v. Rowbotham*, 1 S. & T. 73, where the citation was directed to be sent to New York, with instructions to endeavour to discover the respondent, who was believed to be residing there.

ascertainable,<sup>5</sup> substitutional service will be directed, or advertisements of the citation in the newspapers.<sup>6</sup> If the respondent be in prison, the Court will not allow substituted service of the petition and citation to be made on an official of the gaol in which the respondent is confined, unless there is a reasonable probability that the contents of these documents will thereby become known to the respondent.<sup>7</sup> In most cases, however, personal service can be effected, and the citation with a certificate of service endorsed thereon must then be returned into and filed in the Registry.<sup>8</sup> The citation commands appearance within eight days, but when it has to be served abroad, the time will be extended accordingly. The citation, whether personally served or not, must be returned into the Registry before the petitioner can proceed further;<sup>9</sup> and if no appearance is entered within the time named in the citation, the petitioner may upon affidavit filed in the Registry of service and non-appearance, move the Court to direct the mode of trial without waiting for the expiration of the time (twenty-one days) allowed for filing an answer.<sup>1</sup> Generally speaking, however, it is not desirable to move for such directions until the time for answering has expired, and this has been the usual practice. Where there is no answer, the cause is heard before the Court itself.

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<sup>5</sup> *Appleyard v. Appleyard & Smith*, L. R. 3 P. & D. 257.

<sup>6</sup> *Peckover v. Peckover & Jolly*, 1 S. & T. 219; *Smith v. Smith*, 3 S. & T. 216. The citation only is advertised, and not the petition, and the newspapers containing the advertisements must be filed in the Registry with the citation. Rule 15.

<sup>7</sup> *Bland v. Bland*, L. R. 3 P. & D. 233; 44 L. J. P. & M. 14.

<sup>8</sup> Rule 14. Form of certificate, No. 4 in Appendix. The Court may dispense with this rule, and direct the citation to be filed though not so endorsed; as it did in *Coghill v. Coghill & Lauriero*, L. R. 1 P. & D. 26; 35 L. J. P. & M. 32, where the citation had been served on a foreigner at Shanghai and returned without endorsement.

<sup>9</sup> *Cooke v. Cooke & Quaille*, 2 S. & T. 50.

<sup>1</sup> *Wood v. Wood & Hutchins*, L. R. 1 P. & D. 266; 36 L. J. P. & M. 48. And see Rules 17, 18, and Form No. 5 in Appendix.

Appearance.

Appearances are entered in the Registry in a book provided for that purpose, and an appearance may be entered at any time before a proceeding has been taken in default, but after a proceeding has been taken in default, application for leave to enter an appearance is to be made by summons before one of the Registrars, founded on affidavit;<sup>2</sup> notice of the application being given to the other side.<sup>3</sup> The party cited, called the respondent,—which term must be understood to include co-respondent, wherever applicable—having entered an appearance, may

Answer.

within twenty-one days from the date of the service of the citation, file an answer in the Registry, and must on the same day deliver a copy to the petitioner's proctor or attorney. In case the time allowed for entry of appearance to a citation should be more than eight days after service thereof, a respondent who has entered an appearance may, within fourteen days from the expiration of the time allowed for the entry of appearance file in the Registry an answer to the Petition.<sup>4</sup>

When the answer contains matter other than a simple denial of the facts stated in the petition—that is, when it sets up any charge or defence such as will be found explained hereafter<sup>5</sup>—the respondent must file with the answer an affidavit verifying such additional matter in form similar to that required from a petitioner in support of a petition.<sup>6</sup>

Reply.

Within fourteen days from the filing and delivery of the answer, the petitioner may file a reply, and the same

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<sup>2</sup> See Rules 19 to 22, and 185, and Form No. 6 in Appendix. If, for instance, the petitioner has not set the cause down for hearing, and will therefore not be delayed, the respondent may be allowed to appear and answer on an affidavit of having a good defence on the merits.

<sup>3</sup> See Rules 113 to 117 as to Notices and service of them.

<sup>4</sup> Rule 186.

<sup>5</sup> See Chap. IV. Defences in Suits for dissolution of marriage.

<sup>6</sup> See Rules 28 to 31, and Forms of Answers and Verifying Affidavit in Appendix.

period is allowed for any further or subsequent pleading, and copies of all such pleadings must on the same day that they are filed be delivered to the proctors or attorneys for the opposite parties.<sup>7</sup>

Either of the parties before the Court desiring to alter or amend a pleading may apply by summons to one of the Registrars for an order for that purpose.<sup>8</sup> Amend-  
ments.

The principle upon which amendments are allowed or ordered is that justice may be done between the parties by enabling them to bring before the Court all the facts necessary for determining the issues between them;<sup>9</sup> and therefore a petition or answer may be amended by adding a fresh charge where the facts sought to be adduced are *noviter perventa*, and are brought forward *bonâ fide* and not for the purpose of harassing or delaying the other party.

But the Court is very unwilling to allow a charge to be added which from its nature must have been within the knowledge of the party on whose behalf the application is made at the time when the petition or answer was originally prepared.<sup>1</sup>

If the petition or answer be so framed as not to disclose legal grounds for the suit or defence, it may be demurred to, and on joinder in demurrer, the question raised will be argued before the Judge; or he may direct it to be argued before the full Court.<sup>2</sup>

<sup>7</sup> Rules 32, 33.

<sup>8</sup> Rule 187, which supersedes Rule 34, and see Rules 35 to 39; and as to Summonses, Rules 160 to 168.

<sup>9</sup> See *Robinson v. Robinson*, L. R. 2 Prob. Div. 75; 46 L. J. P. D. & A. 47.

<sup>1</sup>In *Rowley v. Rowley*, 1 S. & T. 487, the wife was allowed to amend her petition by adding charges of cruelty, which from motives of delicacy she had suppressed; the Court being satisfied from her affidavit that she had reasonable grounds for her delay in making the charge, and that it was not brought forward for vexatious purposes.

<sup>2</sup> *Burroughs v. Burroughs*, 2 S. & T. 303; *Phillips v. Phillips*, L. R. 1 P. & D. 169. Rule 67.



Mode of  
trial.

On the pleadings being concluded, or when the time has elapsed for appearing and answering, but not till then,<sup>3</sup> the next step is to apply to the Court on motion to direct the mode of trial. This is usually done on behalf of the petitioner, but if he fail to do so, it may be done by the respondent.<sup>4</sup> Either of the parties has the option of asking that the questions of fact raised between them may be tried by the Court itself, or by a special or common jury: but although the Court is generally willing to grant a jury, it is not obligatory upon It to do so, except in suits for dissolution of marriage.<sup>5</sup> Where damages are claimed, there must be a jury, although the respondents or either of may not have appeared.<sup>6</sup>

Questions  
for jury.

When the issues are directed to be tried by a jury, the questions of fact are to be briefly stated in writing by the petitioner, or, if he fail to do so, by either of the other parties to the cause, and settled by one of the Registrars,<sup>7</sup> and copies of the questions so settled are to be delivered to each of the other parties, and, subject to any amendment or alteration, eight days after such delivery, the questions as finally settled are to be filed in the Registry by the petitioner—or if he fail to do so for one month after directions have been given for the mode of trial—by either of the other parties,<sup>8</sup> and at the same time the cause is to be set down as ready for trial, and notice given to each party for whom an appearance has been entered. In like manner, in cases to be heard by the Court itself, the petitioner, after obtaining directions as to the mode of hearing, or, failing the petitioner, either

<sup>3</sup> *Broadwood v. Broadwood & St. Albans*, 34 L. J. P. & M. 10.

<sup>4</sup> See Rule 40 in Appendix.

<sup>5</sup> Divorce Act, ss. 28, 36.

<sup>6</sup> Divorce Act, s. 33.

<sup>7</sup> Rules 41, 42, and Form No. 8 in Appendix.

<sup>8</sup> Or the respondent or co-respondent may take a rule nisi calling on the petitioner to show cause why the petition should not be dismissed. *Stuart v. Stuart*, 3 S. & T. 219; *Hancock v. Hancock & Smith*, L. R. 1 P. & D. 334; 36 L. J. P. & M. 86.

of the respondents entitled to be heard may set the cause down for hearing.<sup>9</sup>

Where cross-suits are instituted—as, for instance, where one party petitions for restitution of conjugal rights, and the other for dissolution of marriage—the Court may either order one of the suits to be stayed,<sup>1</sup> or with the consent of the parties may order the two suits to be consolidated and tried as one; and this is the most convenient course, as the difficulties respecting the admission or rejection of the evidence as it applied to issues raised on the petition or on the answer, which rendered the double suit necessary, have been removed by the Evidence Further Amendment Act, 1869,<sup>2</sup> making the parties to any proceeding instituted in consequence of adultery competent witnesses.

Under the 40th section of the Divorce Act,<sup>3</sup> the Court may, under extreme circumstances, direct the issues to be tried at the assizes, but, bearing in mind the wide discretionary power of the Court, there are many objections to such a course, and as the main object is the saving of expense, the Court will not in any case make such an order against the wishes of the husband, at whose cost the litigation is carried on.<sup>4</sup>

On the assumption that the wife is without means, she is, whether petitioner or respondent, entitled to have her costs taxed against her husband before the hearing of the

Cross-suits.

Issue to assizes.

Wife's costs pending suit.

<sup>9</sup> Rules 43 to 47 in Appendix.

<sup>1</sup> *Drysdale v. Drysdale & others*, L. R. 1 P. & D. 365; 36 L. J. P. & M. 39, where the wife's suit for restitution was ordered to be stayed until after the trial of the husband's suit for dissolution.

<sup>2</sup> 32 & 33 Vict. c. 68, s. 3.

<sup>3</sup> 20 & 21 Vict. c. 85.

<sup>4</sup> *Evans v. Evans & Robinson*, 1 S. & T. 216, where the application was rejected. *Richardes v. Richardes & Jones*, 30 L. J. 48, where the application on the part of the husband to have the issues tried in the country was granted on the ground of the great saving of expense. *Snowball v. Snowball*, L. R. 2 P. & D. 263; 40 L. J. P. & M. 56, where the application on the part of the wife was refused.

cause, in order that she may be provided with the means of prosecuting or defending the suit; and therefore under the directions of the Registrar to whom the bills of costs are referred for taxation, the husband may be ordered to pay into the Registry or give security for a sufficient sum to meet the wife's costs of the hearing.<sup>5</sup> If, however, it can be shown that the wife has an independent income competent to her support, and the expenses of the suit, her privilege as to costs no longer continues.<sup>6</sup>

Evidence  
by affi-  
davit.

The 46th section of the Divorce Act,<sup>7</sup> enacting that the

<sup>5</sup> See Rule 158, and Form of Bond for securing a wife's costs in Appendix. As to taxation of Bills of costs, see Rules 151 to 157, and 199 to 201.

See *Evans v. Evans & Robinson*, 1 S. & T. 330; 28 L. J. P. & M. 137; *Ward v. Ward*, 1 S. & T. 484; *Dickens v. Dickens*, 2 S. & T. 103; 28 L. J. P. & M. 94, as to costs incurred before the institution of the suit; *Suggate v. Suggate*, 1 S. & T. 497; *Allen v. Allen & D'Arcy*, 2 S. & T. 107; 30 L. J. P. & M. 9; *Cooke v. Cooke*, 3 S. & T. 374; 33 L. J. P. & M. 79, as to the principles of taxation of costs; *Bailey v. Bailey & Della Rocca*, 2 S. & T. 112, as to wife's costs of joining in a commission to examine witnesses abroad. The wife of a minor is entitled to have her costs taxed against the guardian of her husband where she is respondent in a suit for dissolution, *Beavan v. Beavan*, 2 S. & T. 652; 31 L. J. P. & M. 166; but not where she is respondent with her *de facto* husband in a suit instituted by the father of the husband, a minor, for nullity of marriage, *Wells v. Cottam f. c. Wells*, 3 S. & T. 364. In *Hall v. Hall*, 3 S. & T. 390, the husband having paid a sum of money into the Registry to meet the wife's costs, died before the cause came to hearing: the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors and for the payment to them out of the fund in the Registry, with leave to the solicitors of the husband's executors to attend the taxation.

See *Keane v. Keane*, L. R. 3 P. & D. 52; 42 L. J. P. & M. 12, as to staying suit until payment of taxed costs by the petitioner.

<sup>6</sup> *Wilson v. Wilson*, 2 Consist. 203, where the wife had a separate income of £440, and the husband only £400 a year for himself and family; *Davis v. Davis*, *ibid.* in *notis*, where the wife had £160 a year secured to her separate use, and the husband was an unbeneficed clergyman without any property or any certain income; in both cases the wives' costs pending suit were refused. These authorities have been followed, *Fyler v. Fyler*, Deane, 175; and the Court continues to act upon the principles there laid down.

<sup>7</sup> 20 & 21 Vict. c. 85.

witnesses in all proceedings before the Court where their evidence can be had are to be sworn and examined orally in open Court, provides that parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall be subject to be cross-examined and re-examined orally in open Court.<sup>8</sup> There must be some very peculiar circumstances to induce the Court to act on the above provision with respect to the principal issues: the matters allowed to be proved by affidavit will be stated under their respective subjects.

By the 47th section of the Divorce Act,<sup>9</sup> it is provided, that where a witness is out of the jurisdiction of the Court, or where by reason of his illness, or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court, to order the examination of such witness upon oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose.<sup>1</sup> On Commission.

As a general rule, orders for a commission or for the immediate examination of a witness are not made until issue has been joined, but subject to some exceptions, as where the questions are well understood, or the witness is dangerously ill.<sup>2</sup> Sufficient notice of the examination

<sup>8</sup> As to Evidence on Affidavit, see Rules 51 to 55, and Rule 188.

<sup>9</sup> 20 & 21 Vict. c. 85.

<sup>1</sup> See Rules 129 to 131 as to the immediate examination of a witness; and Rules 132 to 137, and Rule 198, as to commissions for examination of witnesses; and Form of Commission, No. 20 in Appendix.

<sup>2</sup> In *Cooke v. Cooke & Quail*, 2 S. & T. 50, where the only witnesses to the adultery relied upon were living in a brothel at Liverpool, and there was danger of their evidence being lost, the Court allowed a commission to issue for their immediate examination.

must be given to enable the party against whom the evidence is to be tendered to have a reasonable opportunity of cross-examination.<sup>3</sup> It is in the discretion of the Court to order a commission to be re-opened, so as to enable a witness who has been already examined to be examined again, but It will not make such an order merely on the representation that the witness forgot on the first occasion to state material facts.<sup>4</sup> When the evidence of persons permanently residing abroad has been taken under a commission, the presumption is that they remain abroad until the contrary is shown; but where a person is examined who is about to go abroad for a temporary purpose, or on account of illness, proof of the absence from the jurisdiction or of the continuance of the illness is required.<sup>5</sup>

Inspection  
of docu-  
ments or  
letters.

Where either party is in possession of documents or letters material to the cause, an application may be made on summons supported by affidavit for the delivery or inspection of such documents or letters; and the Judge will either order them to be produced for inspection, or direct them to be filed in the Registry with liberty to the party applying to take copies of such of them as the Judge may think proper: unless the party against whom the application is made files an affidavit that he has no such letters, or that they contain no such matters as suggested.<sup>6</sup>

Trial.

The cause having been set down for trial or hearing

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<sup>3</sup> In *Fitzgerald v. Fitzgerald*, 3 S. & T. 397, notice was given about two p.m. on a Saturday to the respondent's solicitor in London that a witness was to be examined at Bath on Monday, under an order of the Court obtained by the petitioner. The witness died, and at the hearing, his deposition so taken was rejected on the ground that sufficient time had not been given to the respondent's solicitor to attend and cross-examine.

<sup>4</sup> *Bevan v. M'Mahon & Bevan*, 2 S. & T. 55.

<sup>5</sup> *Mills v. Mills*; *Pollack v. Pollack & others*, 2 S. & T. 310.

<sup>6</sup> *Shaw v. Shaw*, 2 S. & T. 642; 31 L. J. 95; *Winscom v. Winscom & Plowden*, 3 S. & T. 383, *in notis*; *Pollard v. Pollard & Hemming*, 3 S. & T. 613.

will come on in its turn unless the Judge should otherwise direct.<sup>7</sup>

In *Keane v. Keane*,<sup>8</sup> a suit for restitution by the husband, the respondent appeared, but filed no answer. Due notice having been given to her, the cause was set down for hearing; and subsequently, upon the motion of the petitioner, the Court ordered the cause to be heard out of its turn, and made a decree, the respondent having received no notice of the motion or the order. Upon the application of the respondent, the Court reversed the decree, ordered the case to be reheard, and gave the respondent, who was stated to have a defence on the merits, leave to file an answer in a fortnight.

A question sometimes arises as to the right to begin. Right to begin.  
The simple rule is that the affirmative must be proved before the negative, and the right to begin therefore devolves upon the party upon whom the substantive issue lies: as, in a suit for restitution of conjugal rights to which cruelty or adultery is pleaded, the respondent has the right to begin, because the matters alleged in the answer, if proved, put an end to the suit.<sup>9</sup>

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<sup>7</sup> See Rules 47, 48, and 50, as to the right of a respondent who has entered an appearance, but who has not answered, to be heard in respect to costs or custody of children.

A list of causes to be heard during the Sittings is printed at the beginning of each Sittings. The Court is always willing to take an undefended case out of its order to meet the convenience of parties whose witnesses have come from a distant part of the country, provided no inconvenience is caused to other suitors.

<sup>8</sup> 41 L. J. P. & M. 41. And see Rules 50 and 116 in Appendix.

<sup>9</sup> *Cherry v. Cherry*, 1 S. & T. 319. In *Bacon v. Bacon & Bacon*, 2 S. & T. 53, the wife in answer to her husband's suit for dissolution of marriage, did not deny the adultery, but pleaded certain countercharges: it was held that she ought to begin. In *Serrell v. Serrell & Bamford*, 2 S. & T. 422; 31 L. J. P. & M. 55, the wife in answer to her husband's suit denied the adultery, and alleged his impotency: it was held that as she had traversed, though in an argumentative way, the marriage alleged by the petitioner, he had the right to begin.

As to the proof of the fact of marriage, which is the first thing to be done, see ante, Ch. I, Proof of Marriage.

## Rules of evidence.

With respect to the evidence to be adduced, it is only necessary here to state that the rules of evidence observed in the Superior Courts of Common Law at Westminster, are to be applicable to and observed in the trial of all questions of fact in the Court.<sup>1</sup> The nature of the evidence required in each kind of suit respectively will be explained in its proper place.

## Adjournment.

Where, on the hearing of any cause, the evidence fails to satisfy the Court, It may from time to time adjourn the hearing, and may require further evidence if it shall see fit to do so;<sup>2</sup> or the cause may be adjourned on various grounds at the request of either of the parties, subject to any order as to costs caused by such adjournment.<sup>3</sup>

## Compromise.

If, at the hearing of a suit for dissolution of marriage or for judicial separation, the parties enter into an agreement for the withdrawing of the proceedings and the settlement of the suit by private arrangement, the Court will recognize such an arrangement, and will consider the parties bound by it; and will treat as a breach of faith any attempt to proceed in the suit, unless it can be shown that there was fraud or such error in the terms of the agreement that it ought not to be binding. But in a suit for restitution of conjugal rights, any compromise between the parties involving an agreement to live apart may be repudiated, and the Court will hear the suit.<sup>4</sup>

## Dismissal of petition.

Where the parties to a suit have become reconciled, or

<sup>1</sup> Divorce Act, s. 48.

<sup>2</sup> Divorce Act, s. 44.

<sup>3</sup> *Bancroft v. Bancroft & Rumney*, 3 S. & T. 610; 34 L. J. P. & M. 31. *Codrington v. Codrington & Anderson*, 4 S. & T. 63; 34 L. J. P. & M. 60, where an adjournment was granted on the ground of surprise at the instance of the respondent in respect of a charge of adultery with a person other than the co-respondent, on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment.

<sup>4</sup> See *Hooper v. Hooper*, 1 S. & T. 602, and on appeal to the full Court, 3 S. & T. 251. *Rowley v. Rowley*, 3 S. & T. 338, and p. 347; affirmed on app. of H. to L. L. R. 1 Sc. & Div. App. 63; 35 L. J. P. & M. 110. *Hayward v. Hayward*, 1 S. & T. 333. See also *Sterbini v. Sterbini*, 39 L. J. P. & M. 82.

where the suit has abated by the death of either the petitioner or the respondent, application may be made to the Court on motion to dismiss the petition, subject to any order which may be asked for as to the costs incurred.<sup>5</sup>

A husband is entitled to have his petition dismissed on payment of costs. The fact that the wife has filed a petition for alimony is not alone sufficient to stay such dismissal.<sup>6</sup>

Although a petitioner may have prayed for a dissolution of marriage, and at the hearing asks permission to alter the prayer to one for judicial separation, the Court will grant the application if no injustice can arise to the respondent, but if the respondent objects on the ground of having a defence, the Court will not alter the petition or the remedy sought until it has heard that defence.<sup>7</sup>

Alteration  
of prayer  
at hearing.

By the 52nd section of the Divorce Act, all decrees and orders to be made by the Court in any suit, proceeding or petition to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments, orders and decrees of the High Court of Chancery may now be enforced and put in execution. Under this provision, the modes of enforcing the decrees and orders of the Court are by writs of attachment, of *fieri facias*, of sequestration, or of *elegit*.<sup>8</sup>

Enforcement  
of  
orders and  
decrees.

It has been held that the above section does not transfer to the Court of Divorce the powers of the Court

<sup>5</sup> See Rule 193.

<sup>6</sup> See *Twistleton v. Twistleton & Kelly*, L. R. 2 P. & D. 339.

<sup>7</sup> *Mycock v. Mycock*, L. R. 2 P. & D. 98 ; 39 L. J. P. & M. 56, where the wife petitioned for dissolution of marriage on the grounds of adultery and cruelty, and both charges were proved, but at her request the decree was suspended. A subsequent application by her for a judicial separation was opposed by the respondent, and the Court refused to allow the prayer of the petition to be altered until the respondent had had an opportunity of bringing before the Court the facts on which his opposition was grounded.

<sup>8</sup> See Rules 110 to 112, and 203.



of Chancery which are ancillary to the enforcement of its decrees, but only those ordinary powers which are necessary for the direct enforcement of them, such as writs of execution and process in contempt. Hence the power given to the Court of Chancery by 1 & 2 Vict. c. 110, ss. 14, 18, on the application of a judgment creditor, to make a charging order on stock standing in the name of, or beneficially belonging to the judgment debtor, cannot be exercised by the Judge of the Court of Divorce.<sup>9</sup>

As imprisonment for mere inability to pay money is now abolished,<sup>1</sup> the Court cannot grant a writ of attachment against a person for not having complied with its orders in that respect, unless it can be shown that the person has the means of paying but will not.<sup>2</sup>

Attach-  
ment for  
contempt.

A writ of attachment may however be issued on other grounds; as for disobeying any order of the Court, or for interfering with, or in any way treating its procedure with contempt.

Intimidat-  
ing suitor  
or witness.

Threatening or attempting by letter or otherwise to intimidate a party to a suit or a witness, is a contempt of Court, which may be punished by fine or imprisonment, or both.<sup>3</sup>

Decrees  
 *nisi* and  
absolute.

Previously to the passing of 23 & 24 Vict. c. 144, a decree in a suit for dissolution of marriage took effect immediately it was pronounced, and subject to an appeal to the House of Lords, the marriage was then and there dissolved; but by the 7th section of that statute it was enacted that every decree for a divorce should in the first

<sup>9</sup> See *Clarke v. Clarke & Clarke*, L. R. 3 P. & D. 57; 42 L. J. P. & M. 72.

<sup>1</sup> 32 & 33 Vict. c. 62.

<sup>2</sup> The procedure is by summons before the Judge in chambers.

<sup>3</sup> *Shaw v. Shaw*, 2 S. & T. 517; 31 L. J. P. & M. 35, where the husband, respondent, attempted to intimidate certain witnesses from giving evidence against him. *Re Mulock*, 3 S. & T. 599, where the Court imposed a fine of £300 on Mr. Mulock for sending a letter to Mrs. Chetwynd, threatening that if her petition were not withdrawn, he would issue a publication respecting her.

instance be a decree *nisi*, not to be made absolute till after the expiration of three months from the pronouncing thereof—that is, the decree was to be good unless cause were shown against it by some person,<sup>4</sup> or by the intervention of the Queen's Proctor, by reason of the decree having been obtained by collusion or by reason of material facts not brought before the Court—and this period of suspense was by 29 Vict. c. 32, s. 3, extended to six months.

By the 36 Vict. c. 31, the provisions of s. 7 of 23 and 24 Vict. c. 144, and of s. 3 of 29 Vict. c. 32, were extended to suits for nullity of marriage.

Intervention by third persons has been rare and not encouraging.<sup>5</sup> Intervention by the Queen's Proctor will be explained in treating of Defences in Suits for Dissolution of Marriage, Chap. IV.

Upon the expiration of the six months—assuming that no cause is shown to the contrary—application may be

<sup>4</sup> See Rules 68, 69, and 70 to 76. By Rule 202, Rules 70 to 76 are no longer applicable to the Queen's Proctor on his showing cause against making a decree *nisi* absolute.

<sup>5</sup> See *Forster v. Forster & Berridge* (Graham intervening) 3 S. & T. 151, where a friend of the co-respondent intervened for the purpose of showing cause on the ground of material facts in the case not having been brought to the notice of the Court: most of those facts had been put on record by the parties, and were not established at the trial, and the intervener did not substantiate by his affidavits a single fact of importance: the Court declined to suspend its decree, and condemned the intervener in the costs occasioned by his intervention—*Clements v. Clements & Thomas* (Eames & Burroughs intervening), 3 S. & T. 394, where the Court declined to act upon the intervention, as it appeared to have been at the instance of the respondents—*Vivian v. Vivian & the Marquis of Waterford* (Leslie intervening), L. R. 2 P. & D. 100; 39 L. J. P. & M. 54, where the intervener having filed affidavits setting out facts to induce the Court not to make the decree absolute, at the last moment withdrew his opposition, and the decree was made absolute: the Court held that It had no power to condemn him in costs.

In short, the best course for any private person wishing to intervene is to lay the facts before the Queen's Proctor.

made on motion to the Judge Ordinary to make the decree absolute.<sup>6</sup>

The decree *nisi* is issued for dissolution of the marriage, or for nullity of the marriage, to be made absolute at the end of six months; but the Court may, under special and peculiar circumstances, exercise Its discretion by reducing the time for the decree absolute to a less period than six months.<sup>7</sup>

The Court can only make the decree *nisi* absolute on the application of the innocent party to the suit.

In *Ousey v. Ousey* and *Atkinson*,<sup>8</sup> a motion having been made on the part of the wife for the decree *nisi* obtained by the husband to be made absolute, the Court expressed Its opinion that as the application for a decree absolute is a material step in the cause, if the petitioner fails to take it within reasonable time, the respondent may call upon him to do so, or to show cause why the decree *nisi* should not be revoked and the petition dismissed for want of prosecution.

#### MINORS—LUNATICS—PAUPERS.

##### Minors.

Minors being incapable of acting in their own names must petition or appear by their guardians until they come of age; except in the case of a minor who as an alleged adulterer is made a co-respondent: he may appear and defend without having a guardian assigned to him.<sup>9</sup>

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<sup>6</sup> As to the mode of application, see Rules 80 and 194, and Form of affidavit in Appendix, No. 12.

The Court cannot suspend the decree absolute on the ground that the petitioner has not paid his proctor's taxed costs. *Patterson v. Patterson & Graham*, L. R. 2 P. & D. 192; 40 L. J. P. & M. 4.

<sup>7</sup> See *Fitzgerald v. Fitzgerald*, L. R. 3 P. & D. 136; 43 L. J. P. & M. 13, where the period was shortened to three months. *M. falsely called B. v. B.*, L. R. 3 P. & D. 200; 43 L. J. P. & M. 42, where an application to reduce the period was refused.

<sup>8</sup> L. R. 1 Prob. Div. 56; 45 L. J. P. D. & A. 33.

See Rules 105 to 108, and Rule 196.

The Committee of a lunatic husband may institute a Lunatics. suit for judicial separation on the ground of the wife's adultery, but not a suit for dissolution of marriage, for in the former case, the lunatic, if he recover, may nullify the proceedings by receiving his wife again; whereas if a divorce were pronounced, the lunatic on recovery might find his wife married to another man, without the power to interfere. The Committee usually applies to the Lord Chancellor for authority to sue, but the Court has no power to require that he should do so.<sup>1</sup>

There is no instance of a suit on behalf of a lunatic wife, for she could hardly be injured by her husband's adultery under such circumstances.

It was formerly held that a suit could not be maintained against a lunatic wife on the ground of her adultery.<sup>2</sup>

It has now, however, been decided that the fact that a respondent has become insane since the institution of a suit for dissolution of marriage on the ground of adultery, is not a bar to the investigation of the charge.<sup>3</sup>

The 58th section of the Divorce Act provides that the Paupers. Court may make such rules and regulations as It may deem necessary and expedient for enabling persons to sue *in formâ pauperis*.<sup>4</sup> With respect to these suits it has been said that the privilege of suing as a pauper—a privilege, however, of which persons do not often avail themselves—"belongs only to the necessity arising from absolute poverty and from the absence of any other

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<sup>1</sup> *Parnell v. Parnell*, 2 Consist. 169; *Woodgate* (Committee of Taylor) v. Taylor, 2 S. & T. 512. In this case the suit was instituted under an order of the Lords Justices, the matter having been first referred to one of the Masters in Lunacy.

<sup>2</sup> *Bawden v. Bawden*, 2 S. & T. 417.

<sup>3</sup> See *Mordaunt v. Mordaunt & others*, L. R. 2 P. & D. 103, 109, & 382; 39 L. J. P. & M. 57; 41 L. J. P. & M. 42. *Mordaunt v. Moncrieffe*, L. R. 2 Sc. & Div. App. 374; 43 L. J. P. & M. 49.

<sup>4</sup> See Rules 25 to 27.

mode of obtaining justice: no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself: besides, it places the adverse party under great disadvantages; it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out."<sup>6</sup> It is not because a person is in insolvent circumstances, or because he can conscientiously swear that he is not worth £25 after all his just debts are paid, that he is therefore entitled to proceed as a pauper, for otherwise many persons in the enjoyment of large incomes might be so entitled. On the principle above laid down, if it appears that the person claiming to sue as a pauper is possessed of property or income, or is capable by his business or profession of earning a livelihood, though it is possible that after payment of his just debts, he may not be worth the sum above named, he will not be considered entitled to gratuitous services in carrying on his suit; and if he has been admitted to sue *in formâ pauperis*, on proof his having an income or of his ability to earn it, the decree by which he was admitted a pauper may be rescinded.<sup>6</sup> A distinction must however be drawn between a skilled artisan, who if he chooses to work, has only to offer his labour and be employed, and a professional man who must wait till clients come to him.<sup>7</sup>

A person suing *in formâ pauperis*, who has had counsel and attorney assigned to him cannot appear by another counsel.<sup>8</sup>

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<sup>6</sup> *Lovelin v. Edwards*, 1 Phill. 183.

<sup>6</sup> *Walker v. Walker*, 1 Curt, 560; *Lait v. Bailey*, 2 Roberts, 150.

<sup>7</sup> *Walker v. Walker*, ut sup., where the husband was a skilled watch-maker, and capable of obtaining adequate employment and remuneration. *Spratt v. Spratt*, Deane, 276, where the husband was a surgeon, and having no patients, had no income.

<sup>8</sup> *Hamer v. Boreham*, 1 S. & T. 26.

A wife suing as a pauper, if she obtains a decree is entitled to costs.<sup>9</sup>

#### PROTECTION OF DESERTED WIFE'S PROPERTY.

A woman deserted by her husband may at any time after such desertion apply to the Judge in chambers<sup>1</sup> for an order to protect any earnings or property which she may have acquired or become possessed of, or to which she may have become entitled as executrix, administratrix, or trustee since the date of the desertion, against her husband and his creditors and any person claiming under him. The order can only be in general terms, and not to protect any specific property, and is to state the time at which the desertion in consequence of which it is made commenced; and from the date and during the continuance of the desertion, the wife is to be treated in all respects as a single woman with regard to contracts and suing and being sued.<sup>2</sup> The order being retrospective in its operation, any property acquired by the woman after the date of the desertion is her own and she may dispose of it by will.<sup>3</sup>

Orders for protection of deserted wife's property.

Under the Divorce Act, the order could only be discharged by the Court or by the magistrate or justices by whom it was made, and to remedy this inconvenience, it was enacted by 27 & 28 Vict. c. 44, that an order made by a magistrate or by the justices at Petty Sessions may be discharged by the successor of the magistrate by whom it was made, or by the justices at any later Petty Sessions, or by the Court.

Discharge of order.

<sup>9</sup> *Afford v. Afford*, 2 S. & T. 387.

<sup>1</sup> See Rules 124, 125, and 197, and Form of Application, No. 19 in Appendix.

<sup>2</sup> See the Divorce Act, s. 21; 21 & 22 Vict. c. 108, ss. 6, 7, 8, 9, 10.

<sup>3</sup> *In the Goods of Ann Elliott*, L. R. 2 P. & D. 274.

Applications by deserted wives for orders protecting their property or earnings are more commonly made to Police magistrates, or justices at Petty Sessions; and by s. 21 of the Divorce Act, every such order is, within ten days after the making of it, to be entered with the Registrar of the County Court, within whose jurisdiction the wife is resident.

### CHAPTER III.

*Of Suits for Dissolution of Marriage, and for Judicial Separation—Suit by the Husband—Co-respondent—Alleging Adultery—Evidence of Adultery—Identity of the Parties—Costs against Co-respondent; against Respondent—Damages—Wife's Suit—Incestuous Adultery—Bigamy with Adultery—Rape—Cruelty—Desertion.*

THE grounds on which persons are entitled to petition for dissolution of marriage are—in the case of the husband; that his wife has, since her marriage with him, been guilty of adultery<sup>1</sup>—in the case of the wife; that her husband has, since his marriage with her, been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et toro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards.<sup>2</sup>

A sentence of judicial separation may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.<sup>3</sup>

Grounds  
of suit for  
dissolution  
of marriage.

For judicial  
separation.

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<sup>1</sup> Antenuptial incontinence cannot be alleged, for it has been purged *quoad* the husband by his consenting to take her for his wife. *Perrin v. Perrin*, 1 Add. 4.

<sup>2</sup> Divorce Act, s. 27.

<sup>3</sup> Divorce Act, s. 16. It will be observed that the terms qualifying "desertion" are slightly varied in the two sections above set out; but practically, they must be read together: "desertion without cause" is



Difference  
between  
suits by  
husband  
and by  
wife.

There is this difference between suits by the husband and the wife: the husband, by establishing his wife's adultery, may, at his option, obtain a complete dissolution of his marriage, or merely a separation from bed and board; but the wife, on the other hand, if she can prove no more than her husband's infidelity, is entitled only to a judicial separation: to entitle her to a dissolution of her marriage, she must establish either one of the criminal offences; or, in addition to his adultery, one of the other offences above enumerated.

Husband's  
suit.

Co-respon-  
dent.

First; of the husband's suit for dissolution of marriage: he must, unless on special grounds to be allowed by the Court, make the alleged adulterer a co-respondent<sup>4</sup>—that is, he must name the man with whom his wife has been guilty of adultery so as to make him a party to the suit—one object of this provision being that he may have an opportunity of appearing and vindicating himself. Moreover, if the petitioner were allowed to proceed without alleging an adulterer, he would get rid of one person interested in defending the suit by bringing forward all the facts of the case. In most cases, however, there is no difficulty in making a co-respondent—as, where the wife has either committed adultery in her home, or has eloped with the adulterer, who is perhaps well known to, or is even an intimate friend of the husband. If the wife has abandoned herself to several men, every man with

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equivalent to "desertion without reasonable excuse." The right to relief on this ground accrues where the desertion has been for two years: there is no legal distinction between the words "or upwards" and "and upwards." Suits on the ground of desertion are almost invariably by the wife. A deserted husband, by obtaining a sentence of judicial separation, procures only immunity from his wife's debts and liabilities; besides, a woman who deserts her husband, generally gives him ground for obtaining complete relief if he chooses to seek it.

<sup>4</sup> Divorce Act, s. 28, which also enacts that "on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent." I am not aware that this has ever been done.

whom she is alleged in the petition to have committed adultery, must be made a co-respondent:<sup>5</sup> in other words, a husband cannot in his petition charge his wife with adultery with a particular man whom he makes a co-respondent, and then go on to allege adultery with other men without also making them co-respondents.

An allegation of adultery implies an adulterer within the meaning of the 28th section of the Divorce Act, and therefore if the petition charges adultery with a person unknown, and names no adulterer, the leave of the Court must be obtained to proceed without making a co-respondent.<sup>6</sup> The circumstances under which the husband may be excused from making the persons with whom the adultery is alleged parties to the suit are, generally, where the wife has been frequenting, or living in a brothel, or leading the life of a prostitute—whenever, in short, she can be proved to have committed adultery with some man or men against whom there is not sufficient evidence, and whom it is impracticable to trace or identify.<sup>7</sup>

A petitioner was allowed to proceed without making the alleged adulterer a co-respondent where no evidence could be obtained against him except the wife's confession that she had committed adultery with him.<sup>8</sup> When the alleged adulterer is dead, the petitioner may, on giving

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<sup>5</sup> *Carrier v. Carrier & Watson*, 4 S. & T. 94. And see Rule 4 in Appendix.

<sup>6</sup> *Pitt v. Pitt*, L. R. 1 P. & D. 464; 37 L. J. P. & M. 24. And see Rules 5 and 6 in Appendix.

As a general rule, the Court will not dispense with a co-respondent on the affidavit of the petitioner alone.

Although the rules, 4, 5, 6, do not require that an application to dispense with a co-respondent should be made at any particular period of the suit, such application should be made at as early a stage as possible. See *Jeffers v. Jeffers*, L. R. 2 Prob. Div. 90; 46 L. J. P. D. & A. 80.

<sup>7</sup> *Hook v. Hook*, 1 S. & T. 183; *Quicke v. Quicke*, 2 S. & T. 419; 31 L. J. P. & M. 28; *Peters v. Peters & Willett*, 3 S. & T. 264.

<sup>8</sup> *Jinkings v. Jinkings*, L. R. 1 P. & D. 330; 36 L. J. P. & M. 48.

proof of his death, proceed without making a co-respondent.<sup>9</sup>

Alleging  
adultery.

The general rule with respect to adultery is that it must be distinctly alleged, and with such reasonable certainty as to enable the respondents to meet the charge. A general allegation of adultery, not specifying with whom, where, or when committed, is bad.<sup>1</sup> The dates, however, of the alleged acts of adultery need not be minutely specified—unless one act only of adultery can be charged, and then the date may be of great importance—but the place or places must be stated. It is sufficient, for instance, to allege in substance, that in and during the months of \* \* and \* \*, the respondent was habitually visited at her residence at \* \* by the co-respondent, and on such occasions committed adultery with him. Where there have been two or more adulterers, the allegations of adultery with each of them should be stated in separate paragraphs. Where no adulterer can be named, the allegation may be to the effect that in and during the months of \* \* and \* \* the respondent has at such place or places committed adultery with a man or men unknown to the petitioner.

So also when the wife is petitioner on the ground of her husband's adultery with prostitutes who cannot be identified: she may allege that he has at such and such times and places committed adultery with divers women unknown to her.

Amending  
petition.

When the petitioner is desirous to bring before the Court acts of adultery which have been discovered since, but which occurred previously to the filing of the petition, application may be made for leave to amend it; or, if the acts of adultery have occurred since the filing of the petition, to file a supplemental petition; and in the latter case, the two petitions may, on summons before the

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<sup>9</sup> *Tollemache v. Tollemache*; *Marsden v. Marsden*, 28 L. J. P. & M. 2, 8.

<sup>1</sup> *Porter v. Porter & Jaggard*, 3 S. & T. 596.

Judge in chambers, be consolidated.<sup>2</sup> Or, the issues may be tried separately.<sup>3</sup>

What will amount to evidence of adultery—and these <sup>Evidence</sup> observations apply to suits both by husband and wife—<sup>of</sup> adultery. must depend upon the circumstances of each case. It is, however, a fundamental rule that it is not necessary to establish the direct fact of adultery by ocular proof; for it very rarely happens that the parties are surprised in the act. In almost every case, the fact must be inferred from circumstances that lead to it by fair inference as a necessary conclusion; but what those circumstances are it is impossible to indicate universally: the only general rule that can be laid down is that they must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.<sup>4</sup>

Where there have been great and undue familiarities between the parties, an attachment before marriage continued afterwards with criminal intention, letters indicating such intention, with opportunities of being alone together in places where they might indulge it, adultery may be presumed to have been committed.<sup>5</sup>

Again, though a woman may have surrendered her mind without surrendering her person, letters from a married woman containing expressions showing that she has given up her mind and affections to another man, taken in connection with personal freedoms and opportu-

<sup>2</sup> *Borham v. Borham & Brown*, L. R. 2 P. & D. 193; 40 L. J. P. & M. 6.

<sup>3</sup> In *Cos v. Cos*, *Reade v. Tobin*, L. R. 2 P. & D. 201; 40 L. J. P. & M. 23, the first co-respondent appeared, but did not answer. The petition was then amended by the addition of charges against the second co-respondent, who appeared and answered. Upon his application, the Court directed the second issue to be tried separately from and before the first.

<sup>4</sup> *Loveden v. Loveden*, 2 Consist. 3, 4; *Burgess v. Burgess*, 2 Consist. 223.

<sup>5</sup> *Ria v. Ria*, 3 Hagg. 74; *Noverre v. Noverre*, 1 Roberts. 428; *Davidson v. Davidson*, Deane, 132.

nities of criminal indulgence, can generally lead to only one conclusion.<sup>6</sup>

Going to a brothel. A woman going to a brothel with a man furnishes almost conclusive proof of adultery, for she could hardly go to such a place but for a criminal purpose; but the visits of a married woman to a single man at his lodging, however imprudent, are hardly sufficient proof of adultery in the absence of letters or some circumstances showing criminal intention. In the case of a married man going to a brothel, or visiting a woman of notorious character—if such conduct does not supply an equal presumption of guilt as in the case of a woman, it furnishes a violent suspicion, only to be rebutted, if it can be rebutted at all, by the very best evidence.<sup>7</sup>

Venereal disease. Venereal disease long after marriage is *primâ facie* proof of adultery; but it can only be conclusive where there is no aspersion upon the chastity of the wife, for if she by her adulterous conduct has placed herself in such a situation that she may have been exposed to infection *aliunde*, so as to have communicated the disease to her husband, the burden of proof is shifted, and she is then under the obligation of showing that her husband contracted the disorder from another person than herself, or at all events of proving that she herself could not have communicated the disease to him.<sup>8</sup>

Confession of adultery. A confession of adultery, whether made in writing or verbally, is evidence of the highest character,<sup>9</sup> and though uncorroborated, is conclusive against the person making it, but not against the other party to the suit with whom the adultery is alleged to have been com-

<sup>6</sup> *Grant v. Grant*, 2 Curt. 57, 69; *Caton v. Caton*, 7 N. of C. 14; *Faussett v. Faussett*, 7 N. of C. 72; *Hamerton v. Hamerton*, 2 Hagg. 8.

<sup>7</sup> *Williams v. Williams*, 1 Consist. 302; *Astley v. Astley*, 1 Hagg. 720.

<sup>8</sup> *Popkin v. Popkin*, 1 Hagg. 767; *King v. King*, 5 N. of C. 253.

<sup>9</sup> *Mortimer v. Mortimer*, 2 Consist. 315; *Noverre v. Noverre*, 1 Roberts, 440.

mitted.<sup>1</sup> The Court must, however, be satisfied that the evidence can be relied upon, and that it amounts to a clear, distinct, and unequivocal admission of adultery.

In *Williams v. Williams* and *Padfield*,<sup>2</sup> the only evidence of adultery consisted of written and verbal admissions by the respondent, and of a verbal admission by the co-respondent: the Court being satisfied, from the circumstances under which the admissions were made, and the conduct of the respondent at the time they were made, and subsequently, that they were genuine, and that there was no reasonable ground to suspect collusion, pronounced a decree.<sup>3</sup>

Whatever may be the nature of the evidence, it devolves upon the petitioner to establish his case affirmatively, and the facts deposed to must be such as are not only possible, but reasonably credible and probable. Therefore, when a wife has behaved with propriety throughout a married life of many years, during which there has not been the least slur or suspicion cast upon her conduct, the Court will require very cogent evidence in support of a charge of adultery; especially if such adultery, as in the case of *Alexander v. Alexander* and *Amos*,<sup>4</sup> is alleged to have been committed under circum-

The facts must be credible and probable.

<sup>1</sup> See the singular case of *Robinson v. Robinson & Lane*, 1 S. & T. 363, where the wife's entries in her diary respecting her intercourse with men would have been amply sufficient to criminate her had not the Court considered her confessions, as being on the whole, the effects of a disordered imagination.

<sup>2</sup> L. R. 1 P. & D. 29; 35 L. J. P. & M. 8.

<sup>3</sup> So in *Le Marchant v. Le Marchant & Radcliff*, 45 L. J. P. D. & A. 43, where the only evidence consisted of confessions of adultery by the wife, and an admission of adultery by the co-respondent, through his counsel, the Court being satisfied that the confessions and admission were *bond fide*, pronounced a decree.

<sup>4</sup> 2 S. & T. 95. In this case the wife had been deterred from putting in an appearance, in consequence of a threat made by her husband's agent. The case having been adjourned, the Court gave her leave to appear and file an answer, and on the case coming on for rehearing, it was treated as a new and not an adjourned case.

stances showing not the slightest regard for decency or fear of detection on her part.

Evidence  
of the  
parties.

The Evidence Further Amendment Act, 1869,<sup>5</sup> enacting that the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceeding, much facilitates the proof or disproof of the alleged adultery. But it is provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

The petitioner is usually called to establish some part of the case,<sup>6</sup> and under the above proviso he cannot be asked merely in cross-examination whether he has been guilty of adultery.<sup>7</sup>

But in *Brown v. Brown and Paget*, the Queen's Proctor intervening,<sup>8</sup> the petitioner having been called for the purpose of disproving certain specific charges of adultery alleged against him by the Queen's Proctor, was held liable to have questions put to him in cross-examination respecting general charges of adultery contained in the pleadings.

Questions  
for jury.

When the husband's suit is tried before a jury, there are two questions for them — whether the respondent committed adultery with the co-respondent, and whether the co-respondent committed adultery with the respondent; for there may be evidence which would affect the

<sup>5</sup> 32 & 33 Vict. c. 68, s. 3.

<sup>6</sup> The petitioner should always attend the hearing of the cause, in order to be called, if necessary. By the 43rd section of the Divorce Act, the Court may order the attendance of the petitioner for the purpose of being examined or cross-examined.

<sup>7</sup> *Babbage v. Babbage & Manning*, L. R. 2 P. & D. 222.

<sup>8</sup> L. R. 3 P. & D. 198; 43 L. J. P. & M. 33.

wife, and not be admissible against the co-respondent, and *vice versâ*. This technicality may lead to no decree being made; as in *Dolby v. Dolby* and *Hewitt*,<sup>9</sup> where the co-respondent denied the charge of adultery, but the wife did not answer the petition; the issue was therefore between the petitioner and the co-respondent only, and the jury found a verdict for the petitioner: the Judge Ordinary not being satisfied that the adultery was proved by the evidence, refused to make a decree against the wife, but allowed the petitioner to amend his case if he could.

Condoned adultery is revived by subsequent adultery; and from the case of *Winscom v. Winscom* and *Plowden*,<sup>1</sup> it would seem that on the part of a wife whose adultery has been condoned, subsequent misconduct and improprieties short of, but tending to adultery, would have the effect of reviving her original guilt so as to found a sentence of dissolution of marriage.

Where the wife sues on the ground of her husband's adultery, the charge against him ought not to be allowed to rest upon the unsupported testimony of the woman with whom the adultery is alleged to have been committed,<sup>2</sup> especially if she is a person of loose character. Upon such evidence, in the case of *Ginger v. Ginger*,<sup>3</sup> the Court, without deciding whether the adultery had or had not been committed, dismissed the petition.

When, however, the adultery has been committed in a brothel, the evidence of prostitutes must sometimes be resorted to, for *in re lupanari, testes lupanares admittentur*.

<sup>9</sup> 2 S. & T. 228.

<sup>1</sup> 3 S. & T. 380.

<sup>2</sup> Moreover, it has been held that such a witness may claim the protection of the proviso in the 3rd section of the Evidence Amendment Act above set out, so that she is not bound to answer any question as to her alleged adultery unless she pleases. *Hebblethwaite v. Hebblethwaite*, Queen's Proctor intervening, L. R. 2 P. & D. 29; 39 L. J. P. & M. 15.

<sup>3</sup> L. R. 1 P. & D. 37; 35 L. J. P. & M. 9.



**Detectives.** The employment of private detectives for the purpose of getting up evidence—though in some few cases they may afford useful assistance—is, as a rule, very objectionable. “They are most dangerous agents,” and the Court looks upon their evidence with much suspicion. “When a man sets up as a hired discoverer of supposed delinquencies, when the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then that man becomes a most dangerous instrument.”<sup>4</sup>

And further, if a husband employs persons to get evidence of adultery upon which to obtain a divorce, even where the wife is leading a life of prostitution, and the persons so employed set about to procure the defilement of the wife, and if by their intervention the wife is purposely induced to commit adultery, the husband has no right to a decree of divorce for an act of adultery so brought about by his own agents; even though it may be proved that he has given no distinct orders to his agents for that purpose.<sup>5</sup>

**Identity of the parties.** The identity of the parties to the suit, when they are not called as witnesses, must be proved either by the direct evidence of persons acquainted with them, or by circumstantial evidence.<sup>6</sup> The Court may decline to act upon the evidence of the petitioner as to the identity of the respondent without some corroboration.<sup>7</sup> In the wife’s suit on the ground of adultery, it is necessary to prove the identity of the husband only; the identity of the

<sup>4</sup> Sir C. Cresswell in *Sopwith v. Sopwith*, 4 S. & T. 246-7.

<sup>5</sup> See *Sugg v. Sugg & Moore*, 31 L. J. 41; *Picken v. Picken & Simmonds*, 34 L. J. 22; *Gower v. Gower, Pearson, Hill & Bunn*, L. R. 2 P. & D. 428; 41 L. J. P. & M. 49.

<sup>6</sup> *Rooker v. Rooker & Newton*, 3 S. & T. 526; *Hulse v. Hulse & Tavernor*, the Queen’s Proctor intervening, L. R. 2 P. & D. 357; 41 L. J. P. & M. 19. And see post, ch. IV, Adultery of petitioner.

<sup>7</sup> *Harris v. Harris & Milton*, L. R. 2 P. & D. 77; 39 L. J. P. & M. 86.

woman is generally not material, so long as she is clearly distinguished from the wife.

Photographs or portraits, when of good size and well executed, are admissible as proof of identity, and are frequently produced for that purpose, but the small things called *cartes de visite* are trustless and ought not to be used. Photographs.

A very useful process imported from the Ecclesiastical Courts is that of a decree or order of confrontation, which—though by the practice of those Courts it was confined to suits for nullity of marriage—has been extended to suits for dissolution. In *Hindmarsh v. Hindmarsh* and *Hussey*,<sup>8</sup> the respondent was allowed to appear and answer after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the petitioner's witnesses for the purpose of being identified. Confrontation.

And in *Lloyd v. Lloyd*,<sup>9</sup> the wife's suit for dissolution of marriage, it being necessary for the witnesses on the part of the husband to be confronted with the petitioner to enable him to establish his defence, and he being unable to ascertain her address: the Court ordered the petitioner to supply him her address within three days, or to attend at the hearing.

By the 34th section of the Divorce Act, whenever in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.<sup>1</sup> Co-respondent is generally condemned in the costs.

<sup>8</sup> L. R. 1 P. & D. 24; 35 L. J. P. & M. 31.      <sup>9</sup> L. R. 1 P. & D. 222.

<sup>1</sup> Under the 19th section of 33 & 34 Vict. c. 28, (the Attorneys' and Solicitors' Act) it was held that where a decree absolute had been made for a dissolution of marriage, with an order for costs against the co-respondent, but before such costs had been taxed, the petitioner died; his representative was entitled to enforce such order against the co-respondent. *Hawks v. Hawks & Fenwick*, L. R. 1 Prob. Div. 137; 45 L. J. P. D. & A. 41.

Generally speaking, the co-respondent has been or appears to have been the seducer, and the Court will mulct him in the whole costs by way of penalty for his misconduct in having rendered the suit necessary; but to this rule, there are some exceptions, and it by no means follows that because the co-respondent has been found guilty, he must therefore pay the costs; and the Court will in its discretion take into consideration the conduct of the husband and wife as well as that of the adulterer, and either acquit the latter from the costs, or divide the liability between the parties.<sup>2</sup>

Excep-  
tions.

The principal exception in favour of the co-respondent occurs when no evidence can be given to show that he knew the respondent to be a married woman, or where she has been leading a profligate life previously to her connection with him,<sup>3</sup> for it would obviously be very unjust to make a man pay the costs of a divorce suit as a penalty for picking up a woman in the streets. In *Nelson v. Nelson* and *Howson*,<sup>4</sup> the petitioner and respondent had

<sup>2</sup> In *Codrington v. Codrington & Anderson*, 4 S. & T. 68; 34 L. J. 60, the verdict established the adultery of the respondent and co-respondent, and her adultery with another man, and rejected a charge against the petitioner of conduct conducing to her adultery: the Court considering that the conduct of the petitioner had been such as to invite reasonable challenge, condemned the co-respondent in the costs only of proving the adultery against him, leaving the petitioner to pay the costs of the other issues.

Where a jury, being unable to agree, were discharged without giving a verdict, and on a second trial, the petitioner obtained a verdict, and a decree was pronounced condemning the co-respondent in costs: the Court refused to include in those costs the costs of the first trial. *Wood v. Wood & Stanger*, L. R. 1 P. & D. 467.

Where a decree *nisi* had been pronounced with costs against the co-respondent, and the decree was reversed on the ground of the petitioner's adultery committed subsequently to the decree *nisi*, the order condemning the co-respondent in costs was ordered to stand. *Hulse v. Hulse & Tavernor*, the Queen's Proctor intervening, L. R. 2 P. & D. 357; 41 L. J. P. & M. 19.

<sup>3</sup> *Teagle v. Teagle & Nottingham*, 1 S. & T. 188; *Priske v. Priske & Goldby*, 4 S. & T. 238; *Boyd v. Boyd & Collins*, 1 S. & T. 562.

<sup>4</sup> L. R. 1 P. & D. 510.

lived apart for several years in consequence of her intemperance, and during the separation and before the adultery proved, she had been leading an abandoned life: the Court, notwithstanding that the co-respondent was proved to have known that the respondent was a married woman, refused to condemn him in costs.

Some degree of remissness on the part of the husband in his conduct towards his wife is no excuse for the adulterer;<sup>5</sup> nor will he be relieved from costs merely because the husband has been guilty of adultery, as in *Bremner v. Bremner and Brett*,<sup>6</sup> where the petition was dismissed on that ground, but the co-respondent was ordered to pay the costs incurred by the husband in respect of the issue of adultery found in his favour; and in *Conradi v. Conradi and Flashman*,<sup>7</sup> under similar circumstances, the co-respondent was held responsible for the costs of proving the adultery committed by him with the respondent; and the petitioner for the costs incurred by the co-respondent in establishing a countercharge of adultery against him. But in cases where the petition has been dismissed on the grounds of wilful neglect and misconduct conducing to adultery, or on the ground of connivance on the part of the petitioner, although the adultery has been proved against the co-respondents, the Court has refused to make any order as to costs as between the co-respondent and the petitioner.<sup>8</sup>

In other cases also, costs have either been refused against the co-respondent, or no order has been made;

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<sup>5</sup> *Badcock v. Badcock & Chamberlain*, 1 S. & T. 189.

<sup>6</sup> 3 S. & T. 378; 33 L. J. P. & M. 202. See also *Baker v. Baker & Grigg*, 36 L. J. P. & M. 119.

<sup>7</sup> L. R. 1 P. & D. 163; 35 L. J. P. & M. 49.

<sup>8</sup> *Seddon v. Seddon & Doyle*, 2 S. & T. 640; 31 L. J. P. & M. 101—*Ellyatt v. Ellyatt, Taylor & Halse*, 3 S. & T. 503. So in *Hick v. Hick & Kitchen*, 34 L. J. P. & M. 11, where the adultery was proved, but the petition was dismissed on the ground of the gross misconduct of the petitioner, the Court refused to make any order as to the costs of the petitioner or of the co-respondent.

as, where the petitioner had condoned his wife's adultery with one co-respondent, which was revived by her adultery with another, costs were refused against the co-respondent whose adultery had been condoned.<sup>9</sup> In *Carstairs v. Carstairs, Dickenson, and others*,<sup>1</sup> the respondent was found guilty with one co-respondent; but two co-respondents who were not proved to have been guilty of the adultery charged, but had acted with great imprudence towards the respondent, whom they knew to be a married woman, were left to pay their own costs.

In *Manton v. Manton and Stevens*,<sup>2</sup> the petitioner made a claim for damages against the co-respondent, which he was obliged at great expense to resist by showing that the respondent at the time he made her acquaintance, was leading an abandoned life, a fact of which it appeared that the petitioner must have been aware: the Court made no order whatever as to costs.

Petitioner  
liable to  
pay co-re-  
spondent's  
costs.

In some cases—as where the suit is improperly instituted, or upon insufficient grounds—the petitioner is liable to be condemned in the costs of the co-respondent: as in *Adams v. Adams and Colter*,<sup>3</sup> where the petition claiming damages was dismissed on the grounds of connivance and condonation; the petitioner was ordered to pay the co-respondent his costs, though the adultery with the respondent was proved.

In *Whitmore v. Whitmore and Brettell*,<sup>4</sup> there was no evidence connecting the co-respondent with the respondent, except that of two witnesses, whose testimony did not satisfy the jury that adultery had been committed, and they were discharged without giving a verdict: the petitioner did not go to a second trial, and the petition was dismissed: the Court condemned the petitioner in

<sup>9</sup> *Norris v. Norris, Lawson & Mason*, 4 S. & T. 237.

<sup>1</sup> 3 S. & T. 538.

<sup>2</sup> 4 S. & T. 159; 34 L. J. P. & M. 121.

<sup>3</sup> L. R. 1 P. & D. 333; 36 L. J. P. & M. 62.

<sup>4</sup> L. R. 1 P. & D. 25; 35 L. J. P. & M. 32.

the co-respondent's costs.<sup>5</sup> But in *Wight v. Wight* and *Field*,<sup>6</sup> where no witnesses were called by the respondent or co-respondent, and the jury being unable to agree, were discharged without giving a verdict, and the issues came on for trial a second time, when witnesses were called by the co-respondent, and the jury found a verdict in his favour; the Court refused to condemn the petitioner in the co-respondent's costs of the first trial.

Again, in *West v. West* and *Parker*,<sup>7</sup> the alleged adulterer was called as a witness, and merely denied the charge without explaining his conduct. The jury were unable to agree, and the issue was tried a second time. On the second trial, the co-respondent was again examined, and then entered into full explanations, and the jury found that he was not guilty. The Court, however, refused to condemn the petitioner in his costs, on the ground that he had by his reticence on the first trial and by his suspicious conduct, made the second trial necessary.<sup>8</sup>

The petitioner may also be called upon to pay the co-respondent's costs where he applies for leave to withdraw his petition altogether, or as against the co-respondent,<sup>9</sup> as is sometimes done for want of sufficient evidence.

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<sup>5</sup> But in *Bancroft v. Bancroft & Rumney*, 34 L. J. P. & M. 144, where, though the petitioner had a strong case against the co-respondent, the jury were discharged without giving a verdict, and the petitioner was unable or unwilling to go to a second trial, having to pay the respondent's costs in his own suit, as well as in a cross-suit by her; the Court declined to order him to pay the co-respondent's costs.

<sup>6</sup> L. R. 1 P. & D. 368; 36 L. J. P. & M. 129.

<sup>7</sup> L. R. 2 P. & D. 196; 40 L. J. P. & M. 11.

<sup>8</sup> In this case an attempt was made to distinguish a petition containing a claim for damages from a petition containing no such claim, with respect to the co-respondent's liability to pay costs when the petition is dismissed; but the Court held that there is no such distinction, and that its discretionary power is the same in all cases. See ss. 34, 51 of the Divorce Act.

<sup>9</sup> *Symons v. Symons & Pike*, 2 S. & T. 435; 31 L. J. P. & M. 84, where the application was made on behalf of the respondent and co-respondent on an affidavit by the petitioner, that he had abandoned the suit.—*Smith v. Smith & Millet*, 34 L. J. P. & M. 11.

So also where a suit instituted by the wife is ended before the hearing by her returning to cohabitation, and the husband then applies to have it dismissed, he is liable to pay her costs.<sup>1</sup>

Respondent liable to pay costs.

When the respondent has separate property, the Court may, under the 51st section of the Divorce Act,<sup>2</sup> order her to pay the costs of the proceedings, especially if it appears that she is without excuse, and that the petitioner was free from blame; as in *Milne v. Milne and Fowler*,<sup>3</sup> where the respondent pleaded various charges against the petitioner which she withdrew at the hearing, and the co-respondent made no defence: a verdict was found for the petitioner upon all the issues, and damages were assessed at £1500. The Court condemned the co-respondent in the costs of the issues found against him; and as it appeared that the respondent had a separate income of £4100, while the petitioner had but a moderate income, condemned her in the costs arising out of her pleas and the issues found against her.

Damages: principles on which they are claimed and assessed.

The ground on which the petitioner is entitled to claim damages from the adulterer is that he has been the seducer of his wife; and the petitioner has a right to recover damages up to the extent of the injury he has received in being deprived of the comfort of her society

<sup>1</sup> *Cooper v. Cooper*, 3 S. & T. 392. In *Dixon v. Dixon*, L. R. 2 P. & D. 253; 40 L. J. P. & M. 38, the wife had petitioned for dissolution of marriage, and the husband had appeared and answered: an application on his behalf that the petition might be dismissed on an affidavit by the wife that the suit had been improperly instituted, and that she had returned to cohabitation, was ordered to stand over for a fortnight, that the wife's attorney might tax his costs against the husband.

<sup>2</sup> "The Court, on the hearing of any suit, proceeding or petition under this Act . . . may make such order as to costs as to such Court may seem just." An application for costs against the respondent under this section must be made at the hearing, unless an adjournment for that purpose is asked for. *Wait v. Wait & Flower*, L. R. 2 P. & D. 228; 40 L. J. P. & M. 30, where such an application, after the decree had been made absolute, was refused.

<sup>3</sup> L. R. 2 P. & D. 202; 40 L. J. P. & M. 13.

by that seduction. It devolves upon the petitioner to show—in accordance with the practice in the action for criminal conversation now in name extinct<sup>4</sup>—that he has treated his wife in such a manner that the jury ought to deal liberally with him;<sup>5</sup> and in assessing damages they have therefore to take into consideration the position of the parties, the terms on which they lived together, and the circumstances attending the seduction of the wife. But the damages are not to be measured by the ability of the co-respondent to pay, and evidence cannot properly be given of his property: it is not a question in the cause.<sup>6</sup>

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<sup>4</sup> The action for criminal conversation—that is for pecuniary compensation for the seduction of a wife—abolished by the 59th section of the Divorce Act, is in effect restored by the 33rd section, which enacts that “any husband may either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner,” and that “the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law.” This section has, however, never been acted upon in its “limited” sense, and damages are never claimed from an adulterer except in suits for dissolution of marriage.

When the respondent appears and denies the adultery, and the co-respondent does not appear, no evidence which is not admissible against the respondent—such as a letter from the co-respondent to the petitioner—can be given to show that the respondent has been guilty of adultery; but evidence in aggravation of damages is admissible. *Stone v. Stone & Appleton*, 3 S. & T. 608.

A co-respondent who has appeared but has not answered is not entitled to cross-examine the petitioner's witnesses, or to address the jury on the question of damages: but in *Lyne v. Lyne & Blackney*, L. R. 1 P. & D. 508; 37 L. J. P. & M. 9, after the damages had been assessed and the decree *nisi* pronounced, the co-respondent was allowed to recall and cross-examine the witnesses and address the Court on the question of costs.

<sup>5</sup> *Narracott v. Narracott & Hesketh*, 3 S. & T. 410.

<sup>6</sup> *James v. Biddington*, 6 Car. & P. 589. In *Cowing v. Cowing & Wollen*, 33 L. J. P. & M. 150, it was said that “if the adulterer had used his wealth as a means of seduction, the jury might take it into account.” In *Bell v. Bell & Marquis of Anglesea*, 1 S. & T. 565, the position of the



The Court and the parties to the suit are bound by the finding of the jury, and the Court will not recognize any private arrangement come to between the parties as to the amount of damages to be paid.<sup>7</sup>

How recovered.

It is one thing to get damages assessed, and another to recover them, and it was formerly held that the Court had no power to direct that they should be paid into Court, nor to order immediate execution against the co-respondent;<sup>8</sup> so that he could sell off his property and go abroad. But in *Pritchard v. Pritchard and Bean*,<sup>9</sup> on an affidavit that the co-respondent had removed his furniture and other effects from his residence, the Court made a peremptory order that the damages should be paid to the petitioner within two days, and that if they were not paid within that period, a writ of *fi. fa.* should issue forthwith.<sup>1</sup> And in *Patterson v. Patterson and Graham*,<sup>2</sup> an order was made that the damages awarded should be paid into the Registry of the Court within a certain time. Before the order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the Registry, and proof of them as a debt was not allowed under the bankruptcy. In order to facilitate

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petitioner with regard to the marriage settlements—£5000 having been settled to Mrs. Bell's separate use—was allowed to be submitted to the jury for their consideration in assessing the damages.

<sup>7</sup> *Callwell v. Callwell & Kennedy*, 3 S. & T. 259, where, pending the trial, an arrangement was entered into between the counsel for the petitioner and co-respondent, to the effect that whatever sum the jury might give, the amount to be paid should be £1500.

<sup>8</sup> *Pounsford v. Pounsford & Bulpin*, 2 S. & T. 389.

<sup>9</sup> L. R. 2 P. & D. 53; 39 L. J. P. & M. 46.

<sup>1</sup> In *Bent v. Bent & Footman*, 30 L. J. P. & M. 189, damages having been awarded and the decree suspended in order that the petitioner should make a provision for the respondent; on its appearing that from the circumstances of the co-respondent, the damages might be lost, the Court ordered them to be paid to the petitioner within ten days from the service of such order.

<sup>2</sup> L. R. 2 P. & D. 189; 40 L. J. P. & M. 5.

such proof, the Court rescinded its former order, and directed that the damages should be paid to the petitioner himself.

The petitioner may be allowed to amend his petition by adding a claim for damages, where, after filing his petition, he obtains stronger evidence which may justify him in making such a claim;<sup>3</sup> and on the other hand, he may abandon the claim, either on moving for directions as to the mode of trial, or at the hearing of the cause.

Adding or  
abandon-  
ing claim  
for  
damages.

#### SUIT BY THE WIFE.

I proceed to consider, first, those offences which alone entitle the wife to a dissolution of marriage; secondly, those which, combined with adultery, entitle her to a dissolution of marriage, or independently, to a decree of judicial separation.

Incestuous adultery means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity.<sup>4</sup> Upon this head, it is only necessary to add that adultery so committed is not the less incestuous by reason of the woman so related being illegitimate.<sup>5</sup>

Incestuous  
adultery.

Incestuous adultery which has been condoned will be revived by ordinary adultery so as to found a suit for dissolution.<sup>6</sup>

Bigamy means the marriage of any person being married, to any other person during the life of the former husband or wife, whether the second marriage

Bigamy  
with  
adultery.

<sup>3</sup> *Bartlett v. Bartlett & Balmano*, 34 L. J. P. & M. 64; *Henslow v. Henslow & Beardsley*, 40 L. J. P. & M. 31.

<sup>4</sup> Divorce Act, s. 27.

<sup>5</sup> *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447, where the marriage of a man with the daughter of the illegitimate half-sister of his deceased wife was held null and void under 5 & 6 Wm. IV, c. 54.

<sup>6</sup> *Newsome v. Newsome*, L. R. 2 P. & D. 306.

shall have taken place within the dominions of her Majesty or elsewhere.<sup>7</sup> To establish bigamy as a ground for dissolution of marriage, proof must be given of such a ceremony as, but for the former marriage, would have constituted a valid marriage. If the alleged bigamy has taken place in a foreign country, the marriage law of that country must be formally proved. The bigamy and adultery must have taken place with the same woman: a bigamous marriage with one woman and adultery with another would not constitute "bigamy with adultery" within the meaning of the statute. The bigamy must be proved: proof that the husband has been convicted of bigamy will not suffice.<sup>8</sup> But where there has been a conviction, and the witnesses to prove the bigamy reside at a great distance and cannot be produced without considerable expense, the Court may permit the bigamy to be proved by affidavit.<sup>9</sup>

Rape.

Rape may be proved by the person upon whom the offence was committed, and if there has been a conviction, evidence may be given of it by way of corroboration.

What has been stated respecting bigamy and rape applies equally to the other criminal charges, sodomy and bestiality,<sup>1</sup> which must in like manner be proved independently of any conviction.

CRUELTY—WIFE'S SUIT—CONDUCT ON HER PART PROVOKING  
CRUELTY—HUSBAND'S SUIT.

Not to be  
defined.

In treating of this subject, I shall not add another to the numerous attempts which have been made to define

<sup>7</sup> Divorce Act, s. 27.

<sup>8</sup> *Burt v. Burt*, 2 S. & T. 88; *Horne v. Horne*, 2 S. & T. 48; *March v. March*, 2 S. & T. 49.

<sup>9</sup> *March v. March*, 2 S. & T. 49; *Macartney v. Macartney*, L. R. 1 P. & D. 259; 36 L. J. P. & M. 38.

<sup>1</sup> Sodomy is the unnatural connection of a man with mankind: bestiality is a similar connection with an animal. — See "Archbold's Pleading and Evidence in Criminal Cases."

legal cruelty: it can only be described generally, and rather by effects produced than by acts done.<sup>2</sup> Much must depend upon the station in life, the ages, the habits and education of the parties, for what might be endured by some would be intolerable to others. A blow between persons in the lower conditions and in the highest stations of life bears a very different aspect. Brutal and insulting language and gross indignities will be more deeply resented by persons of refinement than by those

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<sup>2</sup> See Lord Stowell's observations in *Evans v. Evans*, 1 Consist. p. 37.

In stating cruelty in the petition, the various acts and conduct intended to be relied upon should be distinctly, but concisely, set forth in separate paragraphs, but it is not necessary that each paragraph should in itself allege an independent act of cruelty sufficient to found a sentence (*Suggate v. Suggate* 1 S. & T. 489; *Leete v. Leete*, 2 S. & T. 568; 31 L. J. P. & M. 121); and besides stating the leading acts, it is quite proper to allege that the respondent "otherwise treated the petitioner with great cruelty," and under this averment, evidence of details may be given, which, though separately of slight importance, may in the aggregate amount to legal cruelty. In like manner, evidence of violent demeanour and language leading up to and making probable acts of violence may be admissible though not specifically pleaded, but in other respects, the evidence must be limited to the occasions and matters specified. *Jewell v. Jewell*, 2 S. & T. 573; *Squires v. Squires*, 3 S. & T. 541.

If the charges are too general, the respondent may apply on summons before one of the Registrars for particulars. In complying with an order to that effect, however, care must be taken that the particulars given are not inconsistent with the original charges.

In *Sanderson v. Sanderson, Stephens & Hiscox*, 41 L. J. P. & M. 24, the respondent filed particulars of a charge of cruelty which did not correspond with the charge of which they professed to be particulars, and were therefore ordered to be struck out.

Cruelty being a matter specially within the knowledge of the petitioner, the acts and conduct intended to be proved should be stated once for all: the Court is very reluctant to allow a petition on this ground to be subsequently amended by alleging fresh charges.—*Austin v. Austin*, 41 L. J. P. & M. 8.

See Form of Petition on ground of cruelty, in Appendix.

When the question of cruelty is tried before a jury, the Court directs the jury what constitutes legal cruelty, and the jury have to determine in accordance with that direction whether the acts were done and whether they amount to cruelty.—*Tomkins v. Tomkins*, 1 S. & T. 168.

whose bringing up having been coarse in all matters, are inclined to treat such things as almost matters in course.

General principles.

According to the principles laid down by the Ecclesiastical Courts, and acted upon by the present Court, there must be *danger of life, limb, or health*: something which renders cohabitation unsafe, or is *likely* to be attended with injury to the person or to the health of the complaining party. The Court has never been driven off this ground, and in no case has a divorce been granted without proof being given of a *reasonable apprehension* of bodily hurt: but the apprehension must be reasonable, and not arising merely from an exquisite and diseased sensibility of mind. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected, because it is unsafe for her to continue in the discharge of her conjugal duties, and to enforce that obligation upon her, might endanger her security, and perhaps her life; for in all these cases, it must be remembered that the ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.<sup>3</sup>

What must be the extent of injury, or what will reasonably excite apprehension, will depend upon the circumstances of each case. So likewise what may

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<sup>3</sup> *Evans v. Evans*; *Holden v. Holden*, 1 Consist. 35, 453; *Harris v. Harris*, 2 Consist. 148. In *Milford v. Milford*, L. R. 1 P. & D. 295; 36 L. J. P. & M. 30, the wife's petition for dissolution of marriage, the adultery was established: with respect to the cruelty, it was proved that the respondent had, whilst in bed with the petitioner, placed a pillow over her head, which she immediately threw off; and that during an altercation between them, arising from the wife's jealousy, the respondent had taken up a poker, and had threatened to dash out her brains with it, but that on her telling him to put it down he did so. The parties lived together some time after this. The Court held that as there was nothing in the evidence to induce the conclusion that the petitioner's safety was compromised, or any fears for it entertained even by herself, the only relief It could afford was a judicial separation on the ground of adultery. Affirmed on appeal to the House of Lords. 37 L. J. H. of L. 77.

aggravate the character of ill-treatment, must be deduced from various considerations—in some degree from the station of the parties—in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened, nay, the acts may almost change their very essence by the accompaniments.<sup>4</sup> Not only particular stations and situations, and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention.<sup>5</sup>

Station in  
life of the  
parties.

The observations of Dr. Lushington in *Dysart v. Dysart*,<sup>6</sup> seem applicable to this part of the subject.

“The denial of necessities and comforts, even of medical assistance when there are no pecuniary resources, never can be construed into acts of cruelty; but no one could, I think, entertain a reasonable doubt that such a denial, when the fortune was ample, might probably under circumstances be considered differently. It also

Denial of  
necessaries  
and com-  
forts.

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<sup>4</sup> In *Lockwood v. Lockwood*, 2 Curt. 281, the Court took into consideration the wife's state of health and acute suffering, and the danger to her health which might be expected from further cohabitation with her husband, who from irritability of temper had occasionally lost command over himself, and had been on more than one occasion guilty of personal violence towards her.

<sup>5</sup> *Westmeath v. Westmeath*, 2 Hagg. Suppt. 1, and on appeal, 61. The cruelty imputed, as stated in the judgment, p. 73-4, was “not that of cold malignity, or savage, continual, unfeeling brutality of disposition; it is not that of satiated possession producing disgust and hatred: the acts charged are not inconsistent with occasional kindness, with the existence and continuance of strong attachment; nay, even with violent affection; but the main features of the alleged cruelty are great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and of course attended with the danger of a repetition of personal mischief.”

<sup>6</sup> See this case, *passim*, 1 Roberts 106, and on appeal, 470; as to acts of violence, coarse and brutal conduct and language; and especially the strange and eccentric disregard of all the comforts and conveniences befitting the rank and station of the parties to which Lord Dysart exposed his wife, and by which he injured her health, and in the opinion of the Court rendered her return to cohabitation dangerous.

appears to me equally clear that necessities and comforts must have some relation to the rank and station of the parties: where they are in totally different ranks of life, the words 'necessaries and comforts' imply not the same things, the want of some would operate altogether differently. A wife brought up as a gentlewoman would suffer in her health and constitution, nay even her life might be endangered by a mode of living which would be comfortable to a female in a different mode of life."

Threats.

Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court; as the law is not to wait till the threats are carried into execution, till the mischief is actually done; but is to interpose where the words are such as might raise a reasonable apprehension of violence and excite such fear and terror as to make the life of the wife intolerable.<sup>7</sup>

Abusive language.

On the other hand, words of abuse and reproach however irritating, and habits of intoxication however annoying to the wife, without bodily ill-treatment, or threats of it, are not legal cruelty.<sup>8</sup>

<sup>7</sup> *Oliver v. Oliver*; *Kirkman v. Kirkman*, 1 Consist. 361, 409; *D'Aguilar v. D'Aguilar*, 1 Hagg. 775, *in notis*. In this case Lord Stowell said: "It appears to me that if words of serious menace importing bodily harm be legal cruelty, it does not differ much whether they be addressed to the person herself or to a third person: the test is, if they raise reasonable apprehension; indeed they carry with them something of additional strength, if they raise apprehension in others, for that shows the wife was not alarmed on any unreasonable grounds." In *Hulme v. Hulme*, 2 Add. 27, the husband "threatened to cut his wife's arm off, and beat her brains out with it," and a few days after her confinement "to pull her out of bed and kick her up and down the room."

<sup>8</sup> *Cheesutt v. Cheesutt*, 1 Eccl. & Adm. p. 198; *Geils v. Geils*, 6 N. of C. p. 135; *Greenway v. Greenway*, 6 N. of C. 221, where habitual harshness, violent language—such as, calling his wife an "idiot," "bitch," "liar," "whore," without direct proof of personal ill-usage, were held insufficient.

A groundless accusation of incest against the wife, if persevered in, may with other acts constitute a case of cruelty. See *Bray v. Bray*, 1 Hagg. 163; *Gale v. Gale*, 2 Roberts. 423.

In *Hudson v. Hudson*,<sup>9</sup> where the burthen of the wife's complaint was that her husband was much given to habits of intoxication; that he was apt to be on slight provocation rough and coarse in his language to her at most times, and very violent and abusive to her at some—the Judge Ordinary, in dismissing her petition, observed: "It cannot be too widely known that this Court has neither the power nor the inclination to deal with the mere unhappiness of ill-assorted marriages, or the destruction of domestic comfort by the detestable vice of drinking."<sup>1</sup>

But in *Marsh v. Marsh*,<sup>2</sup> where the husband had for years led a life of gross intemperance, had suffered from *delirium tremens*, and had on such occasions inflicted bodily injury on his wife, and by his general conduct materially injured her health; it was held that she could not return to cohabitation without great peril of a renewal of such injuries, and was therefore entitled to a separation. Again, in *Power v. Power*,<sup>3</sup> the Court took into consideration the chances of danger which the wife would incur by returning to cohabitation with her husband who in his fits of drunkenness was uncontrollable, the acts of violence he had been guilty of towards her having been caused not by ill-will, but under the influence of drink.

It follows therefore that if the passions of the husband are so much out of his own control, as to prevent the wife continuing in his society consistently with her personal safety, it matters little from what sources such violence may have originated<sup>4</sup>—unless, indeed, an act of

Habits of  
intoxica-  
tion.

The cause  
of violence  
unimport-  
ant.

<sup>9</sup> 3 S. & T. 314.

<sup>1</sup> In *Brown v. Brown*, L. R. 1 P. & D. p. 50, the Judge Ordinary said: "A decree that should establish habitual drunkenness to be itself a ground for judicial separation would be likely to have a wide application."

<sup>2</sup> 1 S. & T. 312.

<sup>3</sup> 4 S. & T. 173.

<sup>4</sup> In *Dysart v. Dysart*, 1 Roberts. 116, Dr. Lushington says: "When I find conduct towards a wife likely to prove dangerous to her safety, but not



violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that the disorder having been subdued, there was no danger of a recurrence of such acts. But if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion, which would be dangerous to the wife, then, undoubtedly, the Court is bound to emancipate her from such peril.<sup>5</sup>

Cruelty in general cumulative, but may consist of one act of violence.

Although, generally, cruelty lies in the cumulative ill-conduct which the history of the married life discloses, yet the *law* does not require that there should be many acts. The Court is indisposed to interfere on account of one slight act, particularly between persons who have been long under cohabitation; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed it will not be repeated. But, if one act should be of that description which should induce the Court to think that it is

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in other cases, I shall consider it within my cognizance, whatever may have been the cause thereof, whether having arisen from material violence of disposition, from want of moral control, or from eccentricity. It is for me to consider the conduct *itself*, and its probable consequences; the motives and causes cannot hold the hand of the Court, unless the wife be to blame, which is a wholly different consideration. In plainer words, even if I were satisfied that conduct dangerous in itself arose from morbid feelings, out of the control of the husband, I must act, if the danger exist, though it is not my province to inquire into or ascertain such cause."

<sup>5</sup> *Curtis v. Curtis*, 1 S. & T. p. 213.

But though the Court does not hold its hand to inquire into motives and causes, yet where the evidence on behalf of the petitioner disclosed facts from which the respondent's insanity might be inferred, It required to be satisfied that such facts admitted of a different explanation before making a decree; observing that "An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this Court's interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect, it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end."—*Hall v. Hall*, 3 S. & T. 347.

likely to occur again, and to occur with real suffering, there is no rule that should restrain It from considering that to be fully sufficient to authorize its interference ;<sup>6</sup> as in *Reeves v. Reeves*,<sup>7</sup> where a widow married a young man whose discharge from the army she had purchased, and who, on the only occasion they came together after the marriage, kicked and otherwise grossly ill-used her—the Court granted a decree, being of opinion, from the habits and general conduct of the respondent, that the wife would be in great danger of further ill-usage if she lived with him.

But in *Smallwood v. Smallwood*,<sup>8</sup> where the alleged cruelty consisted of one act of violence which occurred in an altercation arising out of the husband's jealous suspicions, when he took his wife by the throat, shook her, and threw her down ; but it did not appear that any marks were left, or that she was rendered ill in consequence ; the petition was dismissed.

Jealousy, whether well or ill - founded, is a fertile source of domestic squabbles : the wife complains of her husband's real or supposed infidelities ; remonstrances lead to quarrels, and quarrels to violence ; though in many such cases, a woman's best weapons would be submission, civility and kindness.

In *Anthony v. Anthony*,<sup>9</sup> the wife's petition for judicial separation, the acts of violence admitted by the husband took place in disputes arising, at least in part, out of the wife's jealousy of a maid servant ; and the Court took into consideration the position in which the wife was placed in the family by reason of the authority which the servants exercised over her by the direction of her husband, and the state of her feelings arising from reasonable suspicion of undue familiarity between her husband and the maid servant.

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<sup>6</sup> *Holden v. Holden*, 1 Consist. p. 458.

<sup>7</sup> 3 S. & T. 139 ; 32 L. J. P. & M. 178.

<sup>8</sup> 2 S. & T. 397 ; 31 L. J. P. & M. 3.

<sup>9</sup> 1 S. & T. 594.

But, on the other hand, indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse on the part of the husband, even though he is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife, do not constitute legal cruelty; unless in connection with such adultery, he is guilty of acts of violence towards his wife, causing her mental and bodily suffering.<sup>1</sup>

In *Swatman v. Swatman*,<sup>2</sup> where the evidence of actual violence on the husband's part was not of itself sufficient to warrant the charge of cruelty; but the wife had been subjected to a continued course of ill-treatment and degradation—daily intoxication with late hours at night; women of the town brought home to his own door, and on more than one occasion introduced into his bed; adultery committed with his female servants under his own roof while his wife was then confined, and familiarity with them even in his wife's presence—the Court dissolved the marriage.

Venereal  
disease.

The communication by the husband of venereal disease to the wife *knowingly* and *wilfully*, is a gross act of

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<sup>1</sup> *Cousen v. Cousen*, 4 S. & T. 164; 34 L. J. P. & M. 139; *Knight v. Knight*, 4 S. & T. 103; 34 L. J. P. & M. 112.

In *Popkin v. Popkin*, 1 Hagg. suppt. 768, *in notis*, Lord Stowell observed: "the attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct of which the wife had a right to complain."

In *Smith v. Smith*, 2 Phill. 207, the cruelty as stated in the judgment consisted in "violence preceded by deliberate insult and injury, . . . the forming an adulterous intercourse with her maid, the keeping that servant in the house notwithstanding the remonstrances of his wife and friends, the deposing his wife from the management of his family and vesting it in this prostitute; and the forcibly taking the child from his wife's care merely to distress his wife."

Adultery committed in the "household" has not yet been held to be legal cruelty.

<sup>2</sup> 4 S. & T. 135.

cruelty.<sup>3</sup> The wilfulness must be judged of from the surrounding circumstances, the condition of the husband, and the probabilities of the case after such explanations as he may offer.<sup>4</sup> *Primâ facie*, however, his state at the time of the infection must be presumed to be within his own knowledge, though he may rebut this by his own evidence or by other proof.<sup>5</sup>

To constitute what may be termed venereal cruelty, the wife must have been infected—there must have been an actual communication of the disease by the husband—the merely running the risk is not sufficient. The communication need not be actually wilful: it may be reckless. If a man marries, who has been suffering from venereal disease some time immediately before the marriage; or if a husband, knowing himself to be in such an ill state that, by having intercourse with his wife, he will run the risk of communicating such disease to her, recklessly has intercourse with her, and thereby communicates the disease, it is, to use the mildest term applicable to such conduct, such *utter recklessness* of the *health and comfort of his wife*, that he is guilty of cruelty in the eye of the law; upon the principle that whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying that he hoped

Must have been actually communicated.

Wilfully or recklessly.

<sup>3</sup> This charge must be distinctly stated in the petition:—"That on or about [such a date] the respondent knowingly communicated to your petitioner a certain venereal disease." In *Squires v. Squires*, 3 S. & T. 541, the petition alleged that the respondent had "by neglecting the petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise, treated her with great cruelty." The Court refused to admit evidence under this allegation, that the respondent had infected the petitioner with venereal disease.

<sup>4</sup> The evidence must be "strong and conclusive," especially if the charge is defended. *Collett v. Collett*, 1 Curt. 678. The testimony of the parties to the suit is not alone sufficient, but must be supported by medical evidence of the condition of the petitioner, and, if possible, also of the respondent at the time of the alleged infection.

<sup>5</sup> *Brown v. Brown*, L. R. 1 P. & D. 46; 35 L. J. P. & M. 13.

a probable consequence might, by some peculiar good fortune, not follow.<sup>6</sup>

Difficulty  
of proof.

But, on the other hand, the mere fact that a husband has communicated disease to his wife, is not sufficient to constitute legal cruelty. The difficulty of proving the *wilfulness*, or at least the *recklessness* which must be inferred from knowledge in the husband of having such a complaint, where, as in cases of secondary syphilis, the symptoms may escape observation, was shown in the case of *Morphett v. Morphett*.<sup>7</sup> The evidence was to the effect that, a few months after marriage, the parties separated; that the wife was examined by a surgeon, who found her to be affected with certain symptoms which indicated that she was suffering from secondary syphilis; that a child was born similarly affected; that the husband was examined by medical men who disproved any trace of such a disease in him; and he positively denied that he had ever had it. On the other hand, there was no imputation against the chastity of the wife either before or after marriage. At the hearing, the jury gave a verdict in favour of the wife, and came to the conclusion that the disease proceeded from the husband.

A rule for a new trial having been argued before the full Court, it was held that it devolved upon the wife to establish affirmatively that her husband having the disease himself, knew either from medical advice, or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in

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<sup>6</sup> *Ciocci v. Ciocci*, 1 Eccl. & Adm. 121. In this case, the wife subsequently petitioned for a judicial separation on account of the same acts of cruelty for which she had obtained a divorce *a mens et toro* in the Ecclesiastical Court. Sir C. Cresswell declined to hear the petition, mainly on the ground of the gross violation of principle involved in putting a party twice on his trial on account of the same acts. *Ciocci v. Ciocci*, 29 L. J. P. & M. 60. *Jones v. Jones*, S. & S. 138. *Boardman v. Boardman*, L. R. 1 P. & D. 233.

<sup>7</sup> L. R. 1 P. & D. 702; 38 L. J. P. & M. 23.

such a stage and form that intercourse with his wife was, at least, distinctly dangerous.

This ruling is, however, strictly applicable only to defended cases. Where the husband does not appear, his guilt will, upon reasonable proof being given of the charge, be assumed against him.<sup>8</sup>

What has been stated with respect to venereal disease, applies, though less strongly, to a cutaneous complaint, which, if knowingly and wilfully communicated, has been held to be an act of cruelty, but not such an act of cruelty as if it stood alone, would require the Court to pronounce, or perhaps justify it in pronouncing, a sentence of separation.<sup>9</sup>

Unnatural connection, if it could be proved, would be an act of cruelty, but the case of *Geils v. Geils*<sup>1</sup> illustrates the gross improbability of the act. The medical evidence was to the effect that it is absolutely and physically impossible for such connection to take place without the

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<sup>8</sup> In a case in which I was of counsel for the wife in a suit by her on the ground of adultery and cruelty, it was proved by the evidence of the petitioner and of the surgeon who attended her that she had suffered very shortly after marriage from all the symptoms of virulent gonorrhoea. No medical evidence could be given respecting the condition of the husband; and as, though he had by his answer denied the charges, he did not appear at the hearing; the jury, under the direction of the Judge Ordinary, at once found a verdict for the petitioner.

There may, however, be much difficulty in establishing such a charge when its denial entails strict proof upon the person alleging it; for it seems to be admitted by medical men that there are no *certain* means of distinguishing gonorrhoea from similar symptoms caused by inflammation.

<sup>9</sup> *Chesnut v. Chesnut*, 1 Eccl. & Adm. 205.

<sup>1</sup> 6 N. of C. 97, 163. So in *N. v. N.* 3 S. & T. 234, where a similar charge was made, Sir C. Creswell said: "The crime here imputed is so heinous and so contrary to experience that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath without any further evidence, direct or circumstantial, to support the charge."

The commission by the husband of sodomy with another person, coupled with neglect of and unkindness towards his wife—as being conduct *per quod consortium amittitur*—has been held to constitute legal cruelty. See *Mogg v. Mogg*, 2 Add. 292.

passive consent and acquiescence of the woman, as the least motion on her part would prevent it, and unless actual force were used—that is, actual violence or the woman were deprived of all power of resistance—such connection could not take place.

Spitting  
in the face.

Spitting in the wife's face is a gross act of cruelty, and combined with other acts of violence, indignity, or threats of violence importing danger to person or to health, has been held sufficient to found a decree; but what would be the effect of such an act taken by itself has not been decided, for here again, much must depend upon the social condition of the persons who are capable of provoking or inflicting such wanton outrages.<sup>2</sup>

Another test of injuries of this kind is the sense in which they are received. "If," said the Judge of the Consistory Court, in *Westmeath v. Westmeath*,<sup>3</sup> "they are

<sup>2</sup> *D'Aguilar v. D'Aguilar*, 1 Hagg. 776; *Otway v. Otway*, 2 Phill. 95; *Saunders v. Saunders*, 1 Roberts. 562; *Waddell v. Waddell*, 2 S. & T. 584; 31 L. J. P. & M. 123.

Dr. Lushington has observed of this act: "So gross a personal insult would be insufferable even in the lowest grades of life. How much more criminal, how much more painful to the feelings of the injured wife when such an offence takes place between those who have been accustomed to the decencies of society, and have been educated to entertain a high regard for them. . . . Is it possible to imagine that when a husband has proved himself so utterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly, that he would, when his passion was excited, restrain himself within the bounds of the law, and that his wife would be safe under his control? Threats of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to any threat, for it proves a malignity of feeling which would require only an opportunity to show itself in acts involving greater personal danger, but never surpassing in cowardly baseness. Nor are such consequences less to be feared, when it is proved, as here it is, that the husband supposed, though vainly so, that he was not within the cognizance of the law, for those who are resolved to go to the verge of the law are the most likely to overstep those bounds which their fear only and not their sense of duty prescribes to them." *Saunders v. Saunders*, ut supra.

<sup>3</sup> 2 Hagg. suppt. 52.

not resented as injuries at the time, a state of things intervenes which either detracts from the weight of the particular evidence when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties."

An instance of as gross an indignity as spitting in the face occurred where a husband assaulted his wife in a public street, and though he did her no personal injury, yet by his filthy language and conduct, he led a passer-by to take her for a common prostitute and insult her: it was held to be a case of gross and abominable cruelty.<sup>4</sup>

Cruelty by the husband towards his children in the presence of the mother, has been held to be cruelty to her,<sup>5</sup> but this must depend much upon the *animus*. In *Wallscourt v. Wallscourt*,<sup>6</sup> Dr. Lushington said: "Where the gist of the charge is *quo animo* the conduct was pursued, it becomes necessary to examine with great minuteness not only the facts themselves, but in the case of severity shown by a father towards a child in the presence of its mother—which is not necessarily cruelty towards the mother, though, under some circumstances, it may amount to cruelty—whether it was an intentional act of cruelty or not; for a father might be guilty of the greatest cruelty towards his child individually, and yet it might not be possible to allege that it was cruelty towards the mother; whereas, on the other hand, a father might be guilty of a less degree of cruelty to his child with the intention of inflicting cruelty upon the mother."<sup>7</sup>

There is, however, a species of cruelty almost worse than physical violence, consisting of the constant repeti-

Cruelty  
towards  
children.

Insulting  
and  
degrading  
treatment.

<sup>4</sup> *Milner v. Milner*, 4 S. & T. 240; 31 L. J. P. & M. 159.

<sup>5</sup> *Bramwell v. Bramwell*, 3 Hagg. p. 637; *Suggate v. Suggate*, 1 S. & T. 491.

<sup>6</sup> 5 N. of C. p. 132.

<sup>7</sup> In *Birch v. Birch*, 42 L. J. P. & M. 23, the Court expressed an opinion that cruelty to a child in the presence of the mother must be such as to affect the mother's health.



tion of insulting and degrading language and conduct, which in the end—for

“Tis the vile daily drop on drop which wears  
The soul out (like the stone) with petty cares”—

breaks down the health of both mind and body and renders life almost unbearable.<sup>8</sup> Under such circumstances, the Court will put a liberal construction on the terms “danger of health,” and grant relief to the suffering party; as in *Kelly v. Kelly*,<sup>9</sup> the distinguishing peculiarity of which case was the adoption by the husband, a clergyman, of a deliberate system of conduct towards his wife with the view of bending her to his authority, and in the course of which, she was purposely subjected to the treatment stated below.<sup>1</sup> The main

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<sup>8</sup> This view of legal cruelty was shadowed forth by Lord Brougham in *Paterson v. Russell*, 7 Bell's Appeal Cases, 337, where in giving judgment, he said: “If the husband without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics, calling upon them to join in those insults, and to treat her with contumely and with scorn; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule at present somewhat vague, as to extend the remedy of a divorce *a mensâ et toro* to a case such as I have put.”

<sup>9</sup> L. R. 2 P. & D. 31; 39 L. J. P. & M. 9, and on appeal to full Court, 28.

<sup>1</sup> “She was entirely deposed from her natural position as mistress of her husband's house; she was debarred the use of money entirely; not only were the household expenses withdrawn from her control, but she was not permitted to disburse anything for her own necessary expenses; every article of dress, every trifle that she required had to be put down on paper, and her husband provided it if he thought proper. Having refused on one occasion of going into the town, to tell her husband everywhere that she had been, an interdict was placed on her going out at will. At one time the doors were locked to keep her in; at another a man-servant was deputed to

cause of this treatment was that some correspondence, which had passed between the petitioner and her brother-in-law and brother respecting the investment by her husband of a sum of money which had been bequeathed to her, fell into Mr. Kelly's hands, from which he took up the idea which he afterwards allowed to fill his whole mind, that his wife was plotting and conspiring against him. The respondent did not deny or even qualify the evidence of the petitioner as to her state of health, but endeavoured to justify his conduct.

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follow her; at another the respondent insisted on accompanying her himself whenever she wished to go abroad. On these occasions he appears to have occupied the short time they were together in what he called putting her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied a separate bedroom; he passed no portion of the day, however small, in her society. They met only at family prayers, and if he spoke to her at all it was only to give some directions, or to reproach her. Save on one or two occasions she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters, unless her husband saw them before they were posted. She was thus, as far as the respondent could achieve it, practically isolated from her friends. Meanwhile, the care of the household was confided to a woman hired for the purpose, who was directed not to obey Mrs. Kelly's orders without the respondent's directions. In short, she was treated like a child or a lunatic, and in this light she was actually regarded by the woman just mentioned, when she first entered the service, and this, be it remembered, though she had passed the mature age of sixty years, and had been married to the respondent for seven-and-twenty years. With no occupation, debarred the society of her husband and son at home and that of her friends abroad, withheld from the performance of her household duties, subordinated to servants, penniless, and so far as her husband could affect it, friendless, the daily life of this lady was little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity, and shame. What wonder that under so grievous an oppression her health at length gave way? She could not eat, she hardly slept at all, she was subject to constant trembling and fainting, she awoke involuntarily screaming at night, and her nervous system was so shattered that the medical witnesses declared paralysis or even madness to be imminent." From the judgment of Lord Penzance, L. R. 2 P. and D. pp. 34, 35; 39 L. J. P. & M. pp. 10, 11.

**Judgment.** In the result, the Court held that force, whether physical or moral, if systematically exerted to compel the submission of the wife, in such a manner, to such a degree, and during such a length of time as to break down her health, and render a serious malady imminent, though there be no actual physical violence, is legal cruelty, and in conclusion observed that "the law leaves the husband, by his own conduct and bearing, to secure and retain in his wife the only submission worth having, that which is willingly and cheerfully rendered. And if he fail, this Court cannot recognize his failure as a justification for a system of treatment by which he places his wife's permanent health in jeopardy, and sets at nought not only his own obligations in matrimony, but the very ends of matrimony itself, by rendering impossible the offices of domestic intercourse and the mutual duties of married life."

Further  
observa-  
tions of  
Lord  
Penzance.

On appeal to the full Court, this decision, decreeing a judicial separation, was affirmed, and the Judge Ordinary then added the following observations: "In determining whether a case is made out for the interposition of the Court, reliance is not to be placed on any one feature of the case to the exclusion of the rest. It is not to be said from anything which the Court has here decided that this or that is denied to the husband or permitted to the wife. The health and safety of the wife is no doubt the leading consideration. Still, it is necessary that due regard should be had not only to the degree in which that safety or health appears to have been compromised or placed in jeopardy, but to the clearness with which this fact is established in evidence. So again, it is necessary that the acts of the husband by which the wife's health or safety is said to have been thus threatened should not only be proved and the alleged consequences plainly deduced from them, but their motives examined and their causes considered. And finally, the conduct of the wife herself by way of provocation must not only be

taken into the account, but her demeanour under even unmerited oppression or unprovoked cruelty must be studied by the Court. It is upon the sum of these considerations that the Court can alone decide whether a case is made for a decree."<sup>2</sup>

Although suits on the ground of cruelty are usually brought by the wife as the more infirm party, it does not necessarily follow that the husband is to blame, or is the only one to blame; for it may have been the fault of both or of the complaining party herself alone; and the decisions have imported this further proposition as a condition of the Court's interference—that the troubles of the wife are not owing to her own misconduct. If a wife can insure her own safety by lawful obedience and a proper self-command, she has no right to come to the Court, for It only affords its aid where the necessity for its interference is absolutely proved. On the other hand, it is not necessary that the conduct of the wife should be entirely without blame, nor does she lose her title to the protection of the Court merely because she has proved unable to bear with perfect patience and unfailing propriety of conduct the ill-usage of her husband. She is clearly justified in not submitting without remonstrance to wanton tyranny or the unreasonable infliction of discomforts and privations injurious to her health.

Husband may not be the only one to blame.

But if she goes beyond this, and provokes violence by violence, the case bears a very different aspect. In *Waring v. Waring*,<sup>3</sup> Lord Stowell said: "When the wife is the complainant, presumptions of injury may be

Violence or provocation by the wife.

<sup>2</sup> L. R. 2 P. & D. pp. 75, 76 ; 39 L. J. P. & M. p. 35.

<sup>3</sup> 2 Consist. 153. In considering the evidence, p. 165, the Judge described with classic humour the successful issue of one of Mrs. Waring's contests with her husband, in which she carried off his wig; "the *opima spolia* of this not *incruenta victoria*: he following her in vain, asking for, and attempting to recover his wig which had been pinned up in the window curtains of the drawing-room, and not discovered and *recaptured* till the next day."

derived from the comparative weakness of her constitution: it is not however impossible that she may have been the aggressor, and by provocations have brought upon herself the ill-treatment complained of: when that appears, she is not entitled to relief from the Court: it is the consequence of her own conduct, and she has the remedy in her own hands by an alteration of her conduct; and if the law was not backward in its interference in such a case, it would furnish the wife with a very short course to a sentence of separation if she wished it, for she would have nothing to do but to provoke ill-treatment by ill-behaviour. I do not mean by this, that every slight failure of duty on the part of the wife is to be visited by intemperate violence on the part of the husband. The correction of such failings must be softened by a due recollection of human infirmity, and of the tender relation subsisting between such parties; and there may be cases of that kind provoked by the wife, but unduly visited by the husband, in which the Court would not decline to interfere. But if the conduct of the wife is inconsistent with the duties of that character, and provokes the just indignation of the husband, and causes danger to her person, she must seek the remedy for that evil, so provoked, in the change of her own manners. . . . That which is violent, if aggressive, may be justified or excused if defensive; and, if the wife gave the first blow—though to return it may not be manly—the law will allow for human infirmity under such gross and scandalous indignity. . . . To entertain personal scuffles with a woman and a wife is a cruel necessity; but a man may protect and defend his own life and liberty. It is a difficult task to return blows, let them come from whom they may, with words only.”

So in *Best v. Best*,<sup>4</sup> the Court said: “No wife can

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<sup>4</sup> 1 Add. p. 423: the wife looked merely to her husband's fortune and endeavoured to extort a settlement by practising every species of annoyance

solicit the interference of the Court to protect her even from ill-treatment which she has drawn upon her by her own misconduct; she must first, at least, seek a remedy in the reform of her own manners.<sup>5</sup> If, however, it should appear that even misconduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife's, positive misconduct."

The foregoing observations comprise almost all that can be said upon those cases in which the wife, though legally the complainant, is morally the delinquent, and naturally lead to the consideration of suits by the husband on account of the wife's cruelty, which, though happily rare, have been occasionally brought, and with success. For the husband is not the less entitled to be protected from violence, where the wife's passions from whatever cause, whether from the effects of jealousy or from intemperance,<sup>6</sup> are so entirely beyond her control that she is in the habit of assaulting him so as to place him in danger of bodily injury, though no serious injury may have been inflicted.<sup>7</sup>

Again to cite the language of Lord Stowell:—"Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity and threaten pain: it will be

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upon him; absenting herself from his house repeatedly against his will; and by rendering his habitation during her presence in it a constant scene, not merely of verbal altercation but actual personal conflict.—P. 417.

<sup>5</sup> In *Taylor v. Taylor*, 2 Lee, 172, the wife was held not entitled to a divorce by reason of cruelty, as it appeared that she was a person of bad temper, and had not behaved well and dutifully to her husband.

<sup>6</sup> But the drunken violence of the wife will only justify the use of such force on the part of the husband as may be necessary to restrain her; he has no right to retaliate and beat her.—*Pearman v. Pearman & Burgess*, 1 S. & T. 601.

<sup>7</sup> *White v. White*, 1 S. & T. 591.

the duty of the Court to say that the suffering party is not obliged to continue in cohabitation under such treatment." And with respect to violence caused by jealousy:—"Jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual.<sup>8</sup> If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone: it cannot be necessary that in order to obtain the protection of the Court, it should be made to appear to proceed from malignity."<sup>9</sup>

Distinction  
between  
suits by  
husband  
and by  
wife.

Dr. Lushington, while admitting that the same principles of cruelty would be applicable to suits by the husband, as by the wife, was of opinion that "there must be some distinctions, necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from his wife's violence."<sup>1</sup> But the position of the husband as petitioner on the ground of cruelty was well considered in the case of *Prichard v. Prichard*,<sup>2</sup> where the Judge Ordinary said: "Violence by the husband and similar conduct in the wife hardly deserves to be considered in the same identical light. Repeated bodily injury inflicted by the stronger party portends little safety to the weaker.

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<sup>8</sup> Moreover, wives who indulge themselves in violence towards their husbands from well or ill-founded jealousy, would do well to remember that beating an erring husband, locking him up in his own house, or locking him out of it, are not the likeliest means to reclaim his wandering affections; but that such conduct will most probably lead to the very opposite result, and drive the object of such treatment to the comforts of more indulgent and agreeable, though *perhaps* less virtuous society.

<sup>9</sup> *Kirkman v. Kirkman*, 1 Consist. 409. In this case, however, the wife was in the habit of violently assaulting her husband, scratching and tearing his face with her nails, besides insulting him with the most foul and opprobrious language.

<sup>1</sup> *Furlonger v. Furlonger*, 5 N. of C. p. 425.

<sup>2</sup> 3 S. & T. p. 525.

There is nothing to restrain a man in such encounters but himself. Where the woman is the assailant, it is otherwise, and many a man may submit to the outrage of a blow who would defend himself from real injury if imminent. But if the physical effects of violence by the wife are less, the moral results are immeasurably greater. How is it possible that submission, which is the wife's lot in marriage, can be maintained by the husband if she become his assailant? The mutually dependent duties of the marriage state suffer a hopeless confusion in such an inversion of parts. Indignity and loss of self-respect undermine the position of the husband, and release the wife from all moral control. Cohabitation on the terms of the marriage contract ceases to be longer possible. But worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self-defence. And if holding its hand this Court refuse to relieve him from the perils of provocation, what security is there for the safety of the wife herself?"<sup>3</sup>

It only remains to state in connection with this subject, that after a woman has obtained a decree of judicial separation on the ground of her husband's cruelty, she may, on proof of his subsequent adultery, petition for

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<sup>3</sup> Again, in *Forth v. Forth*, 36 L. J. P. & M. 122, "The ground on which the Court interferes in such cases is different from that on which It proceeds when the wife is the petitioner. The fact that the husband can defend himself is the very grievance. It is because he may be tempted in defending himself to retaliate on his wife that the Court is bound to interfere, and to decree a judicial separation when such acts are proved. When a man marries an ill-tempered woman, he must put up with her ill-humour; but the moment she lifts her hand against him, the Court must interfere, for if It does not, how can It answer the husband if he should subsequently allege that he had been forced to use violence in self-defence?"

In this case, a judicial separation was decreed, though the parties had continued to live in the same house until the hearing of the cause; as it appeared that the husband, who held a public appointment from which he derived only a small income, was unable to have a separate home for his wife: he could neither turn her out, nor go elsewhere himself.



dissolution of marriage.<sup>4</sup> But if her suit for judicial separation has been dismissed, the charges of cruelty not having been proved, she is estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution.<sup>5</sup>

And further; a woman who has obtained a decree of judicial separation on the ground of her husband's adultery, may afterwards institute a suit for dissolution of marriage on the grounds of her husband's adultery committed subsequently to the decree for judicial separation, coupled with the cruelty committed during the cohabitation.

The second suit should, however, be instituted without unreasonable delay.<sup>6</sup>

DESERTION—TO BE CONSTRUED BY THE INTENT—DEEDS OF  
SEPARATION—CASES ILLUSTRATING DESERTION.

The next ground of relief to be considered is: "adultery coupled with desertion without reasonable excuse for two years or upwards" as founding the wife's suit for dissolution of marriage; or, "desertion without cause for two years and upwards"<sup>7</sup> as a ground for judicial separation at the suit of either husband or wife."<sup>8</sup>

<sup>4</sup> *Bland v. Bland*, L. R. 1 P. & D. 237; 35 L. J. P. & M. 104.

<sup>5</sup> *Finney v. Finney*, L. R. 1 P. & D. 483; 37 L. J. P. & M. 43.

<sup>6</sup> *Green v. Green*, L. R. 3 P. & D. 121; 43 L. J. P. & M. 6.

In this case the motives of the wife in not suing for dissolution of marriage in the first instance were that she hoped for the reformation of her husband, and that he might return to her.

<sup>7</sup> See ante, p. 55, note 3.

<sup>8</sup> The fact of desertion must be distinctly averred in the petition. See Form in Appendix. The date of the alleged desertion must be stated, in order that the period prescribed by the statute may be clearly shown to have elapsed before the date of filing the petition.

An answer to a petition on the ground of desertion may set out facts showing that there was reasonable ground for the desertion, but such facts should be stated succinctly. *Hill v. Hill*, 33 L. J. P. & M. 187. What

Legal "desertion," within the terms of the Divorce Act, has not yet been, nor is it desirable that it should be strictly defined. To desert is to forsake or abandon so as to break off more or less completely the intercourse which previously existed, and as the degree of intercourse which married persons are able to maintain with each other is various, the facts which constitute "desertion" must vary with the circumstances and mode of life of the parties.

"To some it is given to meet only at intervals, though of frequent recurrence. It is the lot of others to be separated for years, or to meet only under great restrictions. The fetters imposed by the professions of the Army and Navy, the requirements of commercial enterprise, and the call to foreign lands which so frequently attends all branches of industrious life, make these restrictions often inevitable. But perhaps on no class do they fall so heavily as on those who devote themselves to domestic service for the means of life. And yet matrimony is made for all; and matrimonial intercourse must accommodate itself to the weightier considerations of material life. . . . So long, however, as the husband treats his wife as a wife by maintaining such

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will constitute "reasonable excuse," or "cause," short of a matrimonial offence, has not been determined. See post. Chap. IV, under the head of "desertion" as a discretionary bar.

When the answer to a petition alleging desertion merely traverses the charge, evidence is not in strictness admissible of an offer to return subsequently to the alleged desertion, nor is evidence admissible of facts showing the insincerity of such offer to return. The offer to return should be pleaded in the answer, and the facts relied upon to show its insincerity should be pleaded in a replication.

In *Mallinson v. Mallinson*, L. R. 1 P. & D. 93, the respondent was called to prove that he had made the petitioner an offer to return to cohabitation before her right to petition for judicial separation on the ground of his desertion had accrued; and the Court allowed questions to be put to him in cross-examination tending to show that at the time the alleged offer was made, he was adulterously cohabiting with another woman.

degree and manner of intercourse with her as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her.”<sup>9</sup>

To be  
construed  
by the  
intent.

Desertion is to be construed by the *intent*, either at the time when the separation takes place, or subsequently, and such intent must be gathered from the conduct, language or letters of the parties; as in the case of *Lawrence v. Lawrence*,<sup>1</sup> where the marriage took place in 1851, and the cohabitation continued till 1856, when the husband went to China, holding an office in the commissariat. The wife and the only child of the marriage remained in England. By letters written by the husband to his wife between February and December, 1859, it appeared that he had led a most extravagant life in China, and had been found guilty of embezzling moneys; that the wife and her family had treated him liberally in respect of money, and in the course of 1859 had provided him with considerable sums on his representation of amendment and intention of going to Australia. In these letters he expressed affection for his wife and child, but no desire to join them, or be joined by them. He came through Paris to London instead of going to Australia, and on the 10th December, 1859, wrote to his wife that he had spent all his money, and incurred divers liabilities by borrowing and otherwise. He addressed a

<sup>9</sup> *Williams v. Williams*, 3 S. & T. 547, where the husband and wife being in domestic service, but in separate situations, were able to meet only from time to time; and the Court held that the husband's refusal to embark in business—at the wife's request—in which he had before failed, could not be referred to a determination not to cohabit with her.

<sup>1</sup> 2 S. & T. 575; 31 L. J. P. & M. 145.

In *Meara v. Meara*, 35 L. J. P. & M. 33, the husband had left his wife with an expressed intention not to renew cohabitation with her, never afterwards made her an offer of a home, and only went to see her occasionally for the purpose of obtaining her money: casual expressions in her letters to him, in which she recapitulated his misconduct towards her, such as—“under these circumstances I do not wish to see you again,” &c. were held not to imply consent to his remaining apart from her.

few lines to her on the 13th December, 1859, which were the last he wrote, but made no attempt to see her. In November, 1859, he made the acquaintance of the woman with whom the adultery was proved, and in a letter to her dated the 12th August, 1860, wrote:—"I was forced into a marriage some years ago with one who is very rich, and for whom I had no love. . . . I was miserable in my home, and took a staff appointment abroad about three years ago. I have not seen my wife for more than three years."

The wife, by her petition, dated 7th November, 1861, prayed for a dissolution of marriage, and the question was whether, looking at the dates as set out above, there had been desertion for two years before the date of the petition. The Court, construing the husband's letters by his acts rather than their words, came to the conclusion that probably, from the time when he left England, he never *intended* to return to his wife, and that his conduct amounted to desertion.

I have set out the leading facts of this case, because it is a good illustration of the manner in which a separation, harmless in the first instance, may, by circumstances, be converted into desertion.—Generally, however, the separation must have been, from the beginning, against the will of the wife, and must have continued without her consent;<sup>2</sup> for if it has been the result of mutual agreement, or has taken place by virtue of a deed of separation—unless such deed has never been acted upon<sup>3</sup>—there can be no desertion.

Must be  
against the  
will of the  
wife.

<sup>2</sup> *Ward v. Ward*, 1 S. & T. 185, where the husband had been bound over before a police magistrate to keep the peace towards his wife, after which he left her, and lived with another woman: it did not appear clearly that the separation was against the wife's wish, and the decree passed on the grounds of adultery and cruelty. *Smith v. Smith*, 1 S. & T. 359, where the husband was a man of vile habits and bad temper; and after he had left his wife, she went to live with her sister, and there was no proof that he knew where she was living.

<sup>3</sup> *Cock v. Cock*, 3 S. & T. 514. In this case, the parties continued to

In *Nott v. Nott*,<sup>4</sup> the husband having deserted his wife, wrote to her, asking for assistance to save him from starving, but he refused to come to her, or to allow her to come to him. She consented to make him an allowance, and in a few months after the desertion, they both signed a deed of separation, whereby the payment of the allowance was secured to him: the deed was not carried into effect, but she paid the allowance to him for three months, and then stopped it, because she thought that by continuing the payment, she was encouraging him to keep apart from her. She afterwards wrote, and asked him to resume cohabitation, but he refused. More than two years having elapsed since the beginning of the desertion, she filed a petition; and it was held that as she never consented to his remaining apart from her, the desertion was established.

Necessary  
absence  
not  
desertion.

A husband cannot be said to have been guilty of desertion if he has absented himself from the necessity of his circumstances, or for the purpose of seeking employment, provided that he has done so with the intention of renewing cohabitation;<sup>5</sup> but he may "desert"

cohabit for some months after the deed was executed, and though the husband had covenanted not to interfere with his wife, but to allow her to live separate and apart from him, she had never availed herself of that permission. On the contrary, when he actually left her it was against her strongly expressed wish. Moreover, the deed contained certain pecuniary provisions which were never acted upon, and a clause making it, under those circumstances, void.

<sup>4</sup> L. R. 1. P. & D. 251; 36 L. J. P. & M. 10.

<sup>5</sup> *Thompson v. Thompson*, 1 S. & T. 231, where the husband having failed in business in Leeds, went to London in search of employment, leaving his wife at her father's house. During some months he wrote her several letters, which she did not answer. At last he wrote saying that if she did not answer, he must suppose that she no longer wished to be on any terms with him. The Court held that his absence was in the first instance necessary to seek employment, and that, looking at the conduct of the wife, the continuance of that absence could not be considered as desertion.

In *Cudlipp v. Cudlipp*, 1 S. & T. 229, the husband being in embarrassed circumstances left his home in 1843, and did not answer letters from his

his wife, though he may continue to keep up some communication with her, or even to provide her with the means of support; for the wife has a right to the comfort of her husband's society, the security of his home and name, and the protection of his presence, so far as position and avocations will admit, and he cannot turn round and say that he has not deserted her merely because he has made her an allowance.<sup>6</sup>

On the other hand, to neglect opportunities of con-  
 sorting with a wife is not necessarily to desert her. <sup>Neglect  
and  
infidelity.</sup> Indifference, want of proper solicitude, illiberality, denial of reasonable means, and even faithlessness, are not desertion: the fact that a man is living with another woman does not necessarily prove that he has deserted his wife; unless, of course, his connection with her be such as to have withdrawn him entirely from his wife's society—in such a case, the desertion may be dated from the time when the husband made up his mind to abandon his wife, and cohabit with another woman.<sup>7</sup>

In fine; desertion is constituted, not by mere separation, but by the wilful breaking off of matrimonial intercourse by the one party against the will of the other, with the intention of not renewing it.

The husband may effect his object by adopting such a <sup>Desertion  
effected by  
miscon-  
duct.</sup> course of conduct as to render cohabitation unbearable, and thus drive his wife from his society; and upon any proposal to return, she may stipulate for an alteration in his conduct as a condition precedent to a renewal of

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wife telling him that there was an execution in the house. She subsequently supported herself as a governess. In 1844, he made by letter a vague offer of rejoining her, and in 1848 wrote, bidding her farewell for ever. It was held that he had wilfully deserted her in 1843-4, and had never afterwards made a distinct offer of a home.

<sup>6</sup> *Macdonald v. Macdonald*, 4 S. & T. 242; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; 37 L. J. P. & M. 37.

<sup>7</sup> *Ward v. Ward*, 1 S. & T. 185; *Williams v. Williams*, 3 S. & T. p. 548; *Gatehouse v. Gatehouse*, L. R. 1 P. & D. 331; 36 L. J. P. & M. 121.

cohabitation: if he then refuse to amend his ways, his conduct taken altogether may amount to desertion; for she is not bound to go back to him if—for instance—he is carrying on an adulterous intercourse, which would be ground for a separation.

In *Graves v. Graves*,<sup>8</sup> the husband, by his insulting conduct to his wife, compelled her to leave his house: he made no attempt to get her back. About a month afterwards, she tried to induce him to receive her as his wife: he refused, and she received a letter from him to the effect that he did not wish to see or hear anything more of her, and that she might consider the separation which had taken place as final. Afterwards, on a proposal by a common friend of the parties to bring them together, she learnt, for the first time, that he had been carrying on an adulterous intercourse, but expressed her willingness to return if that connection was broken off. Upon the wife's suit for dissolution, the Court held that the husband had evidently determined not to live with his wife, and that his conduct amounted to adultery, coupled with desertion.<sup>9</sup>

The following notes of cases in which desertion was not established will further illustrate the propositions above laid down.

Deed of  
separation.

In *Crabb v. Crabb*,<sup>1</sup> the parties separated, and immediately afterwards executed a deed of separation containing

<sup>8</sup> 3 S. & T. 350; 33 L. J. P. & M. 66.

<sup>9</sup> In *Gibson v. Gibson*, 29 L. J. P. & M. 25, the husband left his wife in 1851, and never afterwards lived with her, or contributed to her support, but at an interview in 1854, the wife offered to renew cohabitation if he would give up gambling and drinking, but he refused: it was held that though the wife had annexed a condition to a renewal of cohabitation, the husband's refusal to abandon his bad habits amounted to desertion.

So also, in *Dallas v. Dallas*, 43 L. J. P. & M. 87, the husband's refusal to live with his wife, notwithstanding her repeated requests to him to return to cohabitation, unless she wrote a letter exonerating a certain lady of whom she had good reasons to be jealous, was held to amount to desertion.

<sup>1</sup> L. R. 1 P. & D. 601; 37 L. J. P. & M. 42.

covenants on the part of the husband to allow the wife £100 a year for the maintenance of herself and her infant son until he attained the age of fifteen, and also giving her the sole custody of the child up to that age. The husband paid the allowance only for the first two quarters, and then went to India, and afterwards declined to pay it. On the hearing of the wife's petition on the grounds of adultery and desertion, it was held that the execution of the deed by the wife was inconsistent with the charge of desertion; for even assuming that the covenant giving the wife sole custody of the child would make the deed void in equity, and notwithstanding the failure on the part of the husband to perform his part of the contract, the separation was in the first instance voluntary, and being an act done under the deed, it could not be treated as if the deed had never existed.<sup>2</sup>

In *Keech v. Keech*,<sup>3</sup> the parties were living together in Jamaica, where the husband held an appointment: the wife was obliged to come to England in consequence of illness. The husband afterwards, in 1851, asked her to return to him, and provided funds for her passage, but her health not being sufficiently re-established, she did not accept his offer. She had no further communication with him, but in 1856, he made her an allowance, which he continued to pay until 1860. It was held that as she had never made any offer to return to him after refusing his request in 1851, he had not deserted her.

In *Fitzgerald v. Fitzgerald*,<sup>4</sup> the wife had instituted a suit on the grounds of adultery and cruelty in which she

<sup>2</sup> "But," said the Judge Ordinary in the above case, "if a man determining to abandon his wife, were to set about fraudulently, by the show of an agreement which he intended never to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the Court might well be asked to reject the false face of the transaction, and regard the real object that lay underneath."

<sup>3</sup> L. R. 1 P. & D. 641; 38 L. R. P. & M. 7.

<sup>4</sup> L. R. 1 P. & D. 694; 38 L. J. P. & M. 14.

No offer  
to renew  
cohabita-  
tion.



failed. The parties never afterwards resumed cohabitation, and neither of them took any steps for the purpose of bringing about a reconciliation. In a second suit by the wife on the grounds of adultery and desertion, the Judge Ordinary, in dismissing the petition, held that the husband's conduct in holding aloof from the wife, and in making no demand of cohabitation, did not constitute desertion; and with respect to cases where a separation, however brought about, has been tacitly acquiesced in, observed:—"No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute desertion. But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime, either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'"

In *Buckmaster v. Buckmaster*,<sup>5</sup> the husband having refused to cohabit with his wife, or to provide a home for her, offered her £100 on condition that she would not molest him in future by insisting on her right to live with him. She agreed to the condition, received the money, and they never afterwards cohabited. It was

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<sup>5</sup> L. R. 1 P. & D. 713; 38 L. J. P. & M. 73.

held that as the wife chose to bargain that they should not live together, there could be no desertion.

Again, in *Parkinson v. Parkinson*,<sup>6</sup> the husband having left his wife, and cohabited with another woman; a deed of separation was, through the interposition of a common friend, entered into, by which the husband covenanted to make his wife an allowance, to be charged upon his reversionary interest in a sum of £5000, and she agreed to live separate and apart from him. The deed was duly executed by the husband and wife, and by a trustee on behalf of the wife: but the husband never paid any part of the allowance, and never contributed to her maintenance. On the hearing of her petition for dissolution of marriage on account of adultery and desertion, it was held that the wife had bargained away her right to relief on the ground of desertion, but that she was entitled, if she chose to apply for it, to a judicial separation on the ground of adultery.<sup>7</sup>

Although the separation of the husband from his wife may have been due to his misconduct, it may have been unavoidable, and therefore may not be, in the legal sense, "desertion," as in *Townsend v. Townsend*,<sup>8</sup> where it appeared that the husband having committed several thefts, separated from his wife with her knowledge and consent, for the purpose of avoiding arrest; that he was afterwards arrested and imprisoned, and having committed other thefts after his release, was on subsequent occasions, again imprisoned; and that while he was in

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<sup>6</sup> L. R. 2 P. & D. 25; 39 L. J. P. & M. 14.

<sup>7</sup> Subsequently, the Court allowed her to amend her petition by adding a charge of cruelty; being satisfied from the affidavits made by her that, until the hearing, she was ignorant that the acts she could prove against her husband amounted to legal cruelty. She had soon after her marriage suffered from syphilis, of the nature of which she was then ignorant, and that the communication of such a disease by her husband was legal cruelty. L. R. 2 P. & D. 27; 39 L. J. P. & M. 21.

<sup>8</sup> L. R. 3 P. & D. 129; 42 L. J. P. & M. 71.

prison, and also in the intervals between his imprisonments, he kept up a correspondence with his wife, and repeatedly endeavoured to induce her to return to cohabitation, but she refused to do so. The Court held that there was no desertion, the husband's separation having been involuntary.

Right to  
sue having  
accrued  
not barred  
by offer to  
return.

When the wife's right to sue on the ground of desertion has once accrued, such right cannot be barred by a subsequent offer on the part of her husband to return and cohabit with her, provided that the necessary period of desertion—two years—be complete before such offer is made; nor is it necessary that the desertion should continue to the time of filing the petition, where the husband has been guilty of adultery as well as desertion, for he thereby creates a bar to his wife's return, and she would, by accepting his offer to renew cohabitation, condone the adultery, which she is under no obligation to do.<sup>9</sup>

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<sup>9</sup> *Cargill v. Cargill*, 1 S. & T. 235; *Basing v. Basing*, 3 S. & T. 516; 33 L. J. 150.

## CHAPTER IV.

*Defences in Suits for Dissolution of Marriage and for Judicial Separation — Statutable Provisions — Intervention by the Queen's Proctor — Absolute Bars : Connivance ; Condonation ; Collusion — Discretionary Bars : Petitioner's Adultery ; Unreasonable Delay ; Cruelty ; Desertion or Wilful Separation ; Wilful Neglect or Misconduct conducing to Adultery—29 Vict. c. 32, s. 2—Wife's Costs after Suit.*

BEFORE entering in detail upon the defences in suits for dissolution of marriage,<sup>1</sup> I will state the rules and provisions to be observed by the Court in such suits. By the 29th section of the Divorce Act, it is the duty of the Court to satisfy itself so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and also to inquire into any countercharge which may be made against the petitioner; and by the 30th section: In case the Court on the evidence in relation to any such petition shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then, and in any of the said cases, the Court shall dismiss the said petition.

<sup>1</sup> And which, though not so provided by the statute, are in some respects equally applicable to suits for judicial separation.

These being the cases in which the petition is to be dismissed, the 31st section describes cases in which a decree of dissolution is to be pronounced.

Cases in which decree to be made.

In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved.

But the obligation thus imposed is modified by a proviso which takes certain cases out of the category of the obligation created by the former part of the section.

Proviso.

The proviso is: that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

Beyond a mere denial then,<sup>2</sup> which in effect only enables the respondent or co-respondent to put in issue at the hearing of the cause, the credibility of the evidence adduced in support of the petition—the charges or defences which under the above sections may be set up in answer to a petition for dissolution of marriage—or may be found by the Court upon the hearing—may be

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<sup>2</sup> If the fact or the legality of the marriage itself be denied in the answer, the validity of the marriage is then the first question to be decided.

divided into absolute and discretionary bars: absolute being, Connivance; Condonation; Collusion;<sup>3</sup> either of which, if proved to the satisfaction of the Court, constitutes an absolute bar to the relief sought by the petitioner: discretionary being, Adultery; Unreasonable delay; Cruelty; Desertion or Wilful separation; Wilful neglect or misconduct conducing to the adultery; either of which, though proved, leaves the Court a discretion, according to the circumstances to grant or withhold its decree.<sup>4</sup>

As the Court had not always the means of discovering collusion, and it was quite possible that a dissolution of marriage might be obtained where each party knew the other to be equally guilty: in order in some degree to meet such cases, it was enacted by 23 & 24 Vict. c. 144, s. 7, that at any time during the progress of the cause, or before the decree is made absolute,<sup>5</sup> any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may under the direction of the Attorney-General, and by leave of the Court, intervene in the suit,<sup>6</sup> alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall

Interven-  
tion by the  
Queen's  
Proctor.

<sup>3</sup> Collusion is from its nature more especially the subject of discovery by the Court, or of intervention by the Queen's Proctor.

<sup>4</sup> With regard to the discretionary power of the Court under the above proviso; it has been held that when the allegations in the petition have been established, a case for the exercise of the discretion of the Court does not arise unless there is affirmative evidence of one of the discretionary bars above enumerated. *Haswell v. Haswell & Sanderson*, 1 S. & T. 502.

<sup>5</sup> As to decrees *nisi* and absolute, and intervention—or as it has been properly termed, interference—by third persons, see ante, p. 49.

<sup>6</sup> See Rules 68, 69 in Appendix.

be lawful for the Court to order the costs of such counsel and witnesses, and otherwise arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.<sup>7</sup>

When he  
may  
intervene.

Under the above section, the Queen's Proctor may intervene at any stage of a suit for dissolution of marriage, or before the decree is made absolute; and may allege not only actual collusion, but also any counter-charge against the petitioner which may be brought to his knowledge, and which may operate as an absolute, or as a discretionary bar to the suit.<sup>8</sup>

It is only when the Queen's Proctor has reason to allege collusion that it is necessary that he should apply to the Court for leave to intervene under the latter part of this section. But if the Queen's Proctor receives information of material facts necessary to the due decision of a case before the Court during the progress

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<sup>7</sup> It had been decided that costs could not be given to the Queen's Proctor except when he proved collusion; and that costs could not be given against him when he intervened unsuccessfully. But now, by 41 Vict. c. 19, s. 2, where the Queen's Proctor or any other person shall intervene or show cause against a decree *nisi* in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just; and the Queen's Proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided, that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office.

<sup>8</sup> *Drummond v. Drummond*, 2 S. & T. 269; *Latour v. Latour & Weston*, 2 S. & T. 524; *Gray v. Gray*, 2 S. & T. 554; *Marris v. Marris & Burke*, 2 S. & T. 530; *Boulton v. Boulton & Page*, 2 S. & T. 638; 31 L. J. P. & M. 27.

of the cause, he cannot at that time take any steps except to watch the case and see whether such material facts are brought to the notice of the Court. If they are not, he will be entitled as one of the public, but acting under the direction of the Attorney-General, to show cause against the decree being made absolute, in which case he will follow the ordinary practice prescribed by rules.<sup>9</sup>

The result of such intervention is that the Court is to deal with the case by making the decree absolute or by reversing the decree *nisi*, or by requiring further inquiry or otherwise as justice may require.<sup>1</sup> When the Queen's Proctor intervenes after a decree *nisi*, and proves his charge against the petitioner, the Court usually reverses the decree and dismisses the petition; and when damages have been awarded, such reversal may include the verdict of the jury in that respect;<sup>2</sup> for, as will be seen hereafter, the petitioner has no legal right to the damages even when recovered, but the Court has power to deal with them as It may think fit.<sup>3</sup>

I now proceed to explain these bars or defences in the order in which I have stated them; and to avoid repetition, shall notice the Queen's Proctor's intervention as it arises under each head.

#### ABSOLUTE BARS.

To connive is to wink; to pretend blindness or ignorance: connivance therefore implies knowledge of, and acquiescence in the adultery charged: as a legal doctrine,

<sup>9</sup> *Hudson v. Hudson & Poole*, L. R. 1 Prob. Div. 65; 45 L. J. P. D. & A. 39.

<sup>1</sup> 23 & 24 Vict. c. 144, S. 7.

<sup>2</sup> In *Ravenscroft v. Ravenscroft & Smith*, the petitioner had obtained a verdict with damages, and a decree *nisi* had been pronounced with costs; but the Queen's Proctor intervened, and proved gross adultery on the part of the petitioner. The Court reversed the decree, including the order against the co-respondent to pay costs and the finding of the jury as to damages. L. R. 2 P. & D. 376; 41 L. J. P. & M. 28.

<sup>3</sup> Chap. VII. Settlement of damages.



it has its source and its limits in the principle, *volenti non fit injuria* :<sup>4</sup> no wrong can be said to have been done to a spouse who has given a willing consent, though without being an accessory before the fact,<sup>5</sup> to the adultery of the other party.

To be "accessory" means not only being willing and consenting to ; but the taking some active steps in promoting the criminal intercourse.

It is not necessary, however, that any active steps should be taken to induce or encourage the criminality : passive acquiescence with an intention that adultery should be committed is as much a bar as active conspiracy. But there must be—if not corrupt encouragement—at least a consenting, willing mind : there must be something more than mere negligence, mere inattention ; than over confidence, dulness of apprehension, mere indifference, mere blindness or weakness : there must be an intentional concurrence either in the actual adultery or in the conduct of the parties leading up to such adultery in order to amount to a bar.<sup>6</sup>

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<sup>4</sup> This doctrine, varied only in expression according to the circumstances, has been laid down in a series of cases which were first collected in *Rogers v. Rogers*, 3 Hagg. 57, and again in *Phillips v. Phillips*, 1 Roberts. 144 ; 3 N. of C. 444 ; on appeal to the Arches Court, 4 N. of C. 523 ; and on appeal to the Privy Council, 5 N. of C. 435.

This last may be considered a leading case, as it was twice the subject of appeal, and the previous decisions and facts were very fully discussed.

<sup>5</sup> In *Glennie v. Glennie & Bowles*, 32 L. J. 17, where the petitioner had married a woman with whom he had previously cohabited, and afterwards allowed her to be visited by a young man she had known before marriage, and with whom she naturally committed adultery ; Sir C. Cresswell said : " To establish connivance, it is requisite not that the party conniving should be actually an accessory before the fact so as to have taken active measures to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to, and therefore on the principle '*volenti non fit injuria*,' he cannot complain of any act he passively assented to."

<sup>6</sup> *Rogers v. Rogers*, 3 Hagg. p. 59 ; *Moorsom v. Moorsom*, 3 Hagg. p. 107 ; *Marris v. Marris & Burke*, Queen's Proctor intervening, 2 S. & T. 530 ; 31 L. J. P. & M. 69.

To take the husband's case:<sup>7</sup> if a man sees what a reasonable man could not see without alarm, if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; if such a state of things exists—whether brought about by the acquiescence of the husband or independently of it—which in the apprehension of reasonable men, would result in adultery, and if the husband, intending that adultery should take place, does not interfere when he might do so to protect his own honour, he is guilty of connivance.<sup>8</sup>

The knowledge and willingness or acquiescence which constitute connivance must be proved like any other conclusion of fact—by express language, or by inference deduced from facts and conduct, but it is not necessary that either knowledge or willingness should be proved affirmatively: both may reasonably be inferred from circumstances: in most cases the evidence can hardly be other than circumstantial, nor can it often happen that connivance can be established by two or three broad facts: it must be gathered from a train of conduct which the Court is to interpret as well as It can.<sup>9</sup> Moreover, it

Evidence of connivance generally circumstantial.

<sup>7</sup> For, connivance is essentially the husband's offence and the wife's ground of defence. A woman is less open to a charge of conniving, as she is not obliged, nor is she able to keep the same watch over her husband's conduct which regard for his honour imposes upon him with respect to her behaviour with men. Besides, in some cases, forbearance is wise on her part; in others, she may yield to the necessity of her position.

In *Turton v. Turton*, 3 Hagg. 338, a suit by the wife on the ground of her husband's adultery with her sister; proof that the wife after knowledge of the previous adultery allowed her sister, under peculiar circumstances, to accompany her husband and herself to India and live in the same house with them, was held not to bar the wife by reason of connivance, as there was nothing in her conduct, however imprudent, to show that she became reconciled in the slightest degree to the continuance of the intercourse between her husband and sister.

<sup>8</sup> *Moorson v. Moorson*, 3 Hagg. p. 106; *Allen v. Allen & D'Arcy*, 2 S. & T. 108, *in notis*; 30 L. J. p. 4, where see the summing up of Hill, J.

<sup>9</sup> *Rogers v. Rogers*, 3 Hagg. p. 60; *Moorson v. Moorson*, 3 Hagg. p. 106.

is not, generally speaking, necessary to prove knowledge of and privity to the actual commission of adultery any more than it is necessary on the other side to prove a specific act of adultery. If the husband has so acquiesced in improper familiarities, or has been so extremely negligent of the conduct of his wife as to encourage such familiar intimacy as would lead to adulterous intercourse, corrupt intention on his part may be inferred.<sup>1</sup>

Con-  
nivance  
not readily  
to be  
presumed.

The presumption of the law is, however, against connivance: it is not readily to be assumed that any man will act so contrary to the general feelings of mankind as to consent to his own dishonour; and therefore, if the facts are equivocal, or can be accounted for without the supposition of intention on his part, the Court will incline to that construction.<sup>2</sup>

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<sup>1</sup> The character of the adulterer is also to be considered. A husband who allows his wife to associate with a notorious libertine goes beyond mere carelessness, and lays himself open to the suspicion of intending the consequences that may follow. *Moorsom v. Moorsom*, 3 Hagg. p. 95. The ages of the parties are not unimportant. An elderly husband ought to exercise a more vigilant superintendence over the conduct of a young wife. *Gilpin v. Gilpin*, 3 Hagg. 153.

<sup>2</sup> *Rogers v. Rogers*, 3 Hagg. p. 61; *Moorsom v. Moorsom*, 3 Hagg. p. 107, in which case Lord Stowell in his concluding observations, at p. 117, said: "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty, and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life. . . . If the question were whether Moorsom acted as a prudent, a wise, or an attentive husband, the result would be unfavourable: if it were a question whether in fact he contributed to the disgrace of his family, the answer would again be unfavourable, but the question is whether he contributed with a corrupt intention:" and held that he had not done so.

The above expressions were adopted by Dr. Lushington in *Phillips v. Phillips*,\* in which case the husband was clearly guilty of culpable indifference—with a previous knowledge of great indiscretion on the part of his wife—to circumstances which ought to have called forth his active interference, but there was nothing to show that he was cognizant of her adultery. Mr. Phillips was a professional man, whose avocations deprived him of the ordinary opportunities of observation. The adulterer was a married man and a friend.

\* Ante, p. 112, note 4.

Further; a husband cannot acquiesce in his wife's adultery with one man, and take advantage of her adultery with another; he must show himself equally awake to her conduct not only with all men but at all times; and as he cannot be allowed to say to the Court *non omnibus dormio*, so neither can he say *non semper dormio*; he cannot be allowed to connive at her adultery with one man, or at one time, and then, to suit his convenience or his purse, claim a dissolution of his marriage on the ground of her adultery with another man, or at another time.<sup>3</sup>

If a husband takes money from the adulterer as a compensation for the wrong done him and to abandon his legal remedy for it, and then leaves his wife in a situation likely to occasion a renewal of the adulterous intercourse with the same person, he is "accessory" to it.

In the case of *Gipps v. Gipps and Hume*,<sup>4</sup> the husband petitioned, in 1861, for a dissolution of his marriage on the ground of his wife's adultery with Hume. Before that petition was filed, an arrangement was made between the petitioner and a Mr. Halliwell, a common friend of the petitioner and the respondent, that £3000 should be paid by Hume to Mr. Halliwell to abide the result of the suit, and that it should be in lieu of costs and damages, and that the petition should not contain any claim for damages. The petition was accordingly filed in that form, and afterwards, the sum of £3000 was paid over to

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<sup>3</sup> *Lovering v. Lovering*, 3 Hagg. 87; *Gipps v. Gipps & Hume*, 3 S. & T. 116.

In *Stone v. Stone*, 3 N. of C. p. 282, Dr. Lushington said: "I never can think that a man who has been so forgetful of his own duties, moral and religious, towards his wife, and of all feelings of honour as a gentleman as to connive at his own disgrace by being a party to her adultery with one man, can come to a Court of Justice with clean hands and seek a separation for the subsequent conduct of his wife, to whose guilt he had been as it were foster-father."

<sup>4</sup> 3 S. & T. 116.

the petitioner.<sup>5</sup> Just before the trial came on, in June, 1861, Gipps signed a paper by which he undertook in consideration of the receipt of £3000 from Hume as costs and damages, and upon Hume securing to him the further sum of £4000, to withdraw his petition. It was found that the record could not be withdrawn, but on the jury being sworn, no evidence was given, and a verdict was taken for the respondents. The parties failed to agree upon the terms of a separation deed between Gipps and his wife, and Hume refused to pay the £4000. In June, 1862, Gipps filed a petition for dissolution of marriage by reason of his wife's adultery in and since August, 1861. Hume pleaded, among other things, connivance: the Court held that Gipps, by foregoing his claim to a divorce for the previous adultery in consideration of a sum of money without making any stipulation as to his wife's future conduct, had shown himself so regardless of his and her honour that he must be taken to have given a tacit consent to any future intercourse between her and her paramour, and dismissed his petition.<sup>6</sup>

Effect and construction of deeds of separation.

In some cases, the question of connivance has been raised where adultery has been committed by the husband or the wife under cover of a deed of separation.<sup>7</sup> In such cases, the Court will not rely wholly and solely on the terms of the deed; but will investigate the circumstances under which the deed was entered into, and will

<sup>5</sup> Sir C. Cresswell, in giving judgment, observed that "this was as like a petition filed by collusion as could well be."

<sup>6</sup> Affirmed on appeal to the House of Lords, 11 H. of L. cas. 1; 33 L. J. P. & M. 161.

<sup>7</sup> Though the mere separation of husband and wife is no bar to relief at the suit of one for adultery committed by the other, yet where a separation has subsisted at the time of the adultery charged, it is peculiarly incumbent on the party charging it—especially that party being the husband—to make out most satisfactorily that the injury complained of is not one to which the complainant was in any sort accessory. *Barker v. Barker*, 2 Add. p. 288.

entertain the broad question whether, taking the deed itself and all the surrounding circumstances into consideration, the husband or wife did in fact consent that the other should live in adultery, and when the whole matter is placed before It, the Court will not determine that there was connivance unless It sees its way very clearly to the conclusion that it was the intention of the petitioner to connive.

In the case of *Barker v. Barker*,<sup>8</sup> which has given the law to subsequent cases of this sort, the husband covenanted and agreed in the deed of separation "that it shall and may be lawful for the said Amelia P. Barker (the wife) from time to time and at all times during the present coverture to live separately and apart from him the said Samuel Barker in such manner and at such place and places, and with such person and persons as the said A. P. Barker shall from time to time think proper to choose—notwithstanding her present coverture—and as if she were sole and unmarried." The wife was said to have been living with another man at the time when that deed was executed, and it was held in the first instance that the deed amounted to a licence or consent on the part of the husband that she should continue to do so. But on appeal to the Court of Arches, Sir J. Nicholl came to the conclusion that there was no connivance on the part of the husband, and that notwithstanding the formal words which had been introduced into the agreement, the husband never intended to consent, and never did consent that the wife should lead an abandoned life; and treating the deed only as evidence that might be rebutted by other evidence, he considered that the evidence which had been given before him was sufficient to rebut it, and that the deed of separation was understood neither by husband nor wife as dispensing to either with the obligation of fulfilling the marriage vow in the article

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<sup>8</sup> 2 Add. 285.

of fidelity, so far as the consent of the other party was concerned, however the contrary might seem upon the mere wording of the deed.<sup>9</sup>

In *Studdy v. Studdy*,<sup>1</sup> the parties executed an agreement to live separate on certain conditions: the last clause in the agreement was as follows:—"Mrs. Studdy promises that if she does not fulfil her part of the agreement, Major Studdy shall have the full power of a husband over her, whatever his way of living may be." She subsequently petitioned for a judicial separation by reason of her husband's adultery before the separation—then unknown to her—and also since the separation. The husband pleaded connivance, and in support of it relied upon the above clause in the agreement. It was held that the words in the agreement, "whatever his mode of living may be," might be construed to apply to the place where and the mode in which the husband might choose to live in reference to his establishment; and that as an innocent meaning might fairly be given to these words, the Court would not presume the immoral contract asserted to have been intended, and that the petitioner was therefore entitled to the relief prayed.<sup>2</sup>

But in *Thomas v. Thomas*,<sup>3</sup> where the husband and wife executed a deed of separation in 1854 which recited, amongst other things, that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust moneys and other property to which Miss H., as well as the husband and wife had been parties; and in 1860, the wife petitioned for a judicial separation on the ground of

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<sup>9</sup> So in *Sullivan v. Sullivan*, 2 Add. 299, a suit for nullity having failed, the parties separated under a deed of separation, precisely similar to that in *Barker v. Barker*, and the wife formed an adulterous connection: the deed was held to be no bar to the husband's suit for divorce.

<sup>1</sup> 1 S. & T. 321.

<sup>2</sup> Affirmed on appeal to the full Court, 28 L. J. P. & M. 105.

<sup>3</sup> 2 S. & T. 113.

her husband's adultery with Miss H. in 1858-9: the Court held that the execution of the deed of separation by the wife knowing at the time that her husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and dismissed the petition.

Again, in *Boulting v. Boulting*,<sup>4</sup> the parties having been married in 1833, separated in 1835 under an ordinary separation deed by which the husband made his wife a weekly allowance. He cohabited with another woman from and after 1842, of which adultery the wife became aware in 1843, but she never complained nor made any remonstrance—although living not far from her husband—until she filed her petition in 1863: her long silent acquiescence was held to constitute a willing consent to, and connivance at her husband's adultery.

But, a deed of separation securing an allowance to the wife does not prove connivance at her husband's adultery unless there is evidence that at the time it was entered into, the wife was aware of such adultery and consented to its being continued. Such consent may be willing or unwilling, for if a wife were to consent, as one of the conditions of the grant of an allowance, to her husband continuing an adulterous intercourse, such consent would amount to connivance, even if it were extorted from her by the pressure of the circumstances in which she was placed, unless of course the pressure to which she was subjected amounted to that degree of force which would invalidate any agreement. She might be very unwilling to consent, but if in the end, she were to withdraw her scruples for the sake of getting an allowance, she would be guilty of connivance.<sup>5</sup>

Deed of separation securing allowance not necessarily proof of connivance.

To condone is to forgive, and as it is not right that a Condonation.

<sup>4</sup> 3 S. & T. 329.

<sup>5</sup> *Ross v. Ross*, L. R. 1 P. & D. 734; 38 L. J. P. & M. 49.



person should be allowed to sue in respect of an injury that has been pardoned—condonation is that species of forgiveness or reconciliation which in furtherance of the marriage-bond, the law has erected into a bar to proceedings for a divorce; and has been defined as a “blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed.”<sup>6</sup>

Definition.

Now, though the essence of condonation is “forgiveness,” it means much more than is expressed by this word as commonly understood: it is a forgiveness legally releasing the offence; and to be complete must be followed by conjugal cohabitation, though not necessarily by connubial intercourse: it may be accompanied with conditions, for a wife, who by her infidelity has forfeited her title to be regarded as a wife, cannot expect an entire reinstatement in her former position; that is beyond the power of the husband to accomplish.<sup>7</sup>

Condonation by the husband.

Condonation further signifies forgiveness of a conjugal offence with a full knowledge of all its particulars; and as a wife by her adultery inflicts the greatest of social injuries upon her husband, and one which he is not supposed readily to forgive<sup>8</sup>—it follows that a woman

<sup>6</sup> *Keats v. Keats & Montanuma*, 1 S. & T. pp. 346, 354.

Condonation is a technical word, and as a legal term has acquired a peculiar signification beyond its proper meaning of pardoning, forgiving, or remitting a debt: though well understood, it had never been defined until the necessity arose for defining it in the above case.

Condonation may be pleaded consistently with a traverse. For instance, the respondent may in one paragraph deny the adultery charged, and in another, allege that the said adultery, if any, was condoned.

When condonation is in issue before a jury, it is a question of fact to be decided by them subject to the explanation of it given them by the Court. *Peacock v. Peacock*, 1 S. & T. 183.

<sup>7</sup> See *Beeby v. Beeby*, 1 Hagg. p. 793; *Keats v. Keats & Montanuma*, 1 S. & T. 334, in which case an attempt was made to establish condonation from verbal expressions of forgiveness on the part of the husband.

<sup>8</sup> *Fatuus est qui meretricem retinet*; a husband who forgives adultery with such facility as to show no sense of injury, and takes no care to

who sets up condonation as an answer to a charge of adultery, must prove that her husband took her back, or continued to live with her after full knowledge of and belief in her guilt, and with the intention of forgiving her.<sup>9</sup>

On the other hand, if the evidence leads the Court to the conclusion that the husband did not thoroughly believe that his wife had been guilty, and therefore did not forgive her when he took her back, condonation is not established.<sup>1</sup>

Condonation on the part of the wife may be considered under two heads: adultery and cruelty. Now, whereas condonation by the husband of his wife's adultery is degrading and dishonourable; forbearance on the part of the wife in bringing her suit, especially if she have a family, in the hopes of reclaiming her husband, is not only excusable, but meritorious. Condonation is not construed so strictly against the wife, for she has not the same control over her husband, nor the same means to enforce the observance of the matrimonial vow: his guilt

Condonation by the wife.

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prevent its happening again, has no ground of complaint, for he encourages the adultery by his conduct. In *Dunn v. Dunn*, 2 Phill. 403; 3 Phill. 6, the husband received his wife back after she had eloped with his friend, without much inquiry, and subsequently she eloped again. Sir J. Nicholl held that he was not entitled to sue, but on appeal, the sentence was reversed.

<sup>9</sup> In *Best v. Best*, 1 Add. 411, the husband having detected an epistolary correspondence between his wife and a man—with whom she was afterwards proved to have committed adultery—but which he treated very lightly, continuing to cohabit for two years, and not setting up the charge of adultery till she sued on account of his cruelty—it was held to be such a constructive condonation, such a want of proper feeling for his own honour, such negligence as to disentitle him to a decree.

In *Dillon v. Dillon*, 3 Curt. 112, it was said "if a husband has received reasonably probable information of his wife's adultery, and continues cohabitation, that is condonation."

Indeed, so great facility of condonation on the part of a husband leads to an inference of connivance.

<sup>1</sup> *Ellis v. Ellis & Smith*, 4 S. & T. 154.

is not of the same consequence to her; her honour is less injured and more easily healed. Her submission, therefore, to her husband's embraces is not considered so strong proof of condonation as his continuing or renewing intercourse with her.<sup>3</sup> She does not forfeit her right to complain at last, unless she has shown by repeated forgiveness an insensibility to the injury.<sup>3</sup>

Condonation of cruelty.

The wife's forgiveness of cruelty is to be regarded in a somewhat different light from that of adultery. Except in cases where her health and comfort are affected by her husband's infidelity, she may more easily forgive the latter than the former offence.

As cruelty in almost every instance is progressive and cumulative, and consists of successive acts of ill-treatment at least, if not of personal injury, there must, in most cases, be something of a condonation of the earlier acts; but complete forgiveness is not to be too readily presumed from the wife continuing in cohabitation even after several acts of cruelty. Such continuance may be caused by the apprehension of some evil which is considered greater than the peril of personal injury—such as the privation of children, and their removal to a foreign land under the restricted control of a harsh and excitable father.<sup>4</sup>

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<sup>2</sup> *Durant v. Durant*, 1 Hagg. 752; *Ferrers v. Ferrers*, 1 Consist. 133; *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 113; *D'Aguilar v. D'Aguilar*, 1 Hagg. p. 786; *Beeby v. Beeby*, 1 Hagg. p. 793; *Dance v. Dance*, 1 Hagg. p. 794, *in notis*.

<sup>3</sup> In *Angle v. Angle*, 6 N. of C. p. 197, it was said: "it is no bar to her suit for her husband's adultery that she was reluctant to quit his society, notwithstanding long suffering and even condoning his offence, until she finds all her hopes of his reformation frustrated."

<sup>4</sup> *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 113; *Curtis v. Curtis*, 1 S. & T. p. 200, where Sir C. Cresswell expressed much doubt whether the wife merely by accompanying her husband to America from fear of being deprived of her children, could be held to have condoned her husband's cruelty. It was not necessary, however, to determine the question.

How long cohabitation may be continued without legal forgiveness of cruelty must depend upon the circumstances of each case. The general presumption is that a husband and wife living together in the same house do live on terms of matrimonial cohabitation, from which condonation may be inferred, but particular circumstances may repel that presumption.<sup>5</sup> Proof of  
condonation.

An extorted or forced return to or continuance in the husband's house without connubial intercourse would not amount to complete forgiveness.<sup>6</sup> Even the presumption arising from the continuance to share the husband's bed may, under special circumstances, be repelled.

This question was well considered by Dr. Lushington in *Snow v. Snow*,<sup>7</sup> where, after reviewing the previous cases, he observed: "I think I am justified in saying that connubial cohabitation after the last act of cruelty is not necessarily and universally a bar, as condonation, to a wife's suit, even though such cohabitation may be in one sense a voluntary cohabitation, or may not be forced or fraudulently brought about by the husband. There are many circumstances in which it would be exceedingly difficult if not impossible for the wife to withdraw from cohabitation, especially when abroad; and if such continued cohabitation were wholly unaccompanied with any intention to condone, and attended by a determination to separate on the first safe opportunity, I think the Court could not hold the wife to be entirely deprived of all remedy in cases of great cruelty where there was no reason to believe—to use Lord Stowell's expression—that the husband was *emendatus moribus*. The Court must consider the safety of the wife: a continuance to share the husband's bed may not, under certain circum-

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<sup>5</sup> *Beeby v. Beeby*, 1 Hagg. suppt. 796.

<sup>6</sup> *D'Aguilar v. D'Aguilar*, 1 Hagg. suppt. p. 782.

<sup>7</sup> 2 N. of C. suppt. p. xvii.

stances, in the least degree prove that she was not afraid of renewed violence or that the husband repented his past cruelty and intended to treat her with conjugal kindness. I am therefore under the necessity of saying that the general principle of condonation arising from connubial intercourse, though not absolutely forced or fraudulent, and of such condonation operating as a bar, does not in all cases of cruelty universally apply to a wife, and that whether such connubial intercourse shall operate as a bar must depend on all the circumstances of each individual case.’<sup>8</sup>

#### REVIVAL OF CONDONED OFFENCES.

Condonation is not an absolute but a conditional forgiveness, the condition being the future matrimonial good conduct of the party forgiven.<sup>9</sup> If a husband has condoned his wife’s adultery with one man, and she commits adultery with the same man, or with another, the condoned adultery thus revived<sup>1</sup> is a material fact which ought not to be suppressed;<sup>2</sup> and in the latter

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<sup>8</sup> In *Turner v. Turner*, 2 Eccl. & Adm. 201, *in notis*, it appearing that the wife had returned to her husband’s bed only under the influence of fear, his cruelty was held not to have been condoned, and a divorce was granted.

<sup>9</sup> *D’Aguilar v. D’Aguilar*, 1 Hagg. suppt. p. 782; *Durant v. Durant*, 1 Hagg. 762.

<sup>1</sup> See *Winscom v. Winscom & Plowden*, 3 S. & T. 380, with respect to the revival of condoned adultery by improprieties short of, but tending to, adultery.

But it must be remembered that repeated condonation by the husband may be turned against him, as evidence of connivance on his part.

<sup>2</sup> The suppression of such a material fact is sufficient to justify a third person, or the Queen’s Proctor, in intervening under s. 7 of 23 & 24 Vict. c. 144, but when the material fact, whatever it may be, is placed before the Court, there is nothing in that section which would justify the Court in withholding a decree, if upon the whole, supposing the fact had been brought to light in the first instance, the petitioner would have been entitled to it.

In *Alexandre v. Alexandre*, the Queen’s Proctor intervening, L. R.

case, he ought in his petition to allege both adulteries, and to make both the adulterers co-respondents.

Assuming that cruelty in the legal sense has been committed, and has been fully condoned by continuous or by renewed cohabitation ; it may be revived either by subsequent acts of cruelty, or by harsh and degrading conduct short of personal violence, or even by threats, if of such a nature and so expressed as to cause a reasonable apprehension of further violence, or that cohabitation would be attended with danger, less being sufficient to destroy condonation than is required to found an original suit ; but to have that effect, the conduct must be of the nature of legal cruelty, such as might justly revive the fear of injury attributed to the original acts.<sup>3</sup> Further, the force of the reviving acts may depend much upon the nature of the original cruelty, which, if of a very gross kind—such as to involve danger of life—would be more easily revived than if it were of a slighter description.<sup>4</sup>

Revival of  
condoned  
cruelty.

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2 P. & D. 164 ; 39 L. J. P. & M. 84, the husband's petition contained two charges of adultery with some persons unknown, and a decree *nisi* was pronounced. The Queen's Proctor intervened and proved condonation by the petitioner of the wife's first adultery. The Court made the decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery.

<sup>3</sup> *Westmeath v. Westmeath*, 2 Hagg. suppt. p. 53 ; *Curtis v. Curtis*, 1 S. & T. 192, and on appeal, 4 S. & T. 234 ; *Bostock v. Bostock*, 1 S. & T. 221 ; *Cooke v. Cooke*, 3 S. & T. 126, 246.

<sup>4</sup> See *Evans v. Evans*, 7 Jur. 1046 ; 2 N. of C. 470. In this case, Dr. Lushington held that, whatever might have been the nature of the cruelty, the wife by instituting a suit for restitution of conjugal rights, and returning to cohabitation, had completely condoned such cruelty. But in *Wilson v. Wilson*, 6 N. of C. 290, the wife had separated from her husband by reason of his gross personal violence, but subsequently, for the sake of maintenance, sued for restitution of conjugal rights, which was decreed, and she returned to cohabitation, when his threats and language were such as justified a reasonable apprehension of violence, and on her petition a divorce was pronounced. On appeal to the Privy Council, the decree was affirmed, and it was held that the renewal of the cohabitation by virtue of the sentence of the Ecclesiastical Court was not a condonation of the former cruelty. 6 Moo. P. C. C. 484.

By adultery.

Cruelty  
reviving  
condoned  
adultery.

Full  
knowledge  
of the  
offence  
necessary.

This conditional forgiveness extends not only to a repetition of the same, but to the commission of any other marital offence which falls within the cognizance of the Court: it therefore follows that condoned cruelty may be so revived by subsequent adultery, as together to found a suit for dissolution; and on the same principle, condoned adultery may be revived by subsequent cruelty.<sup>5</sup> Further to explain this: suppose a wife has completely forgiven her husband's cruelty by continuing to cohabit with him, and he afterwards leaves her and cohabits with another woman; or suppose she has in like manner forgiven his adultery, and he afterwards treats her with cruelty—in either case, the condoned offence is revived by the one subsequently committed.

Full knowledge, however, of a marital offence is necessary to its full condonation: a husband may have been carrying on an adulterous intercourse unknown to his wife at the same time that he has been guilty of cruelty towards her. If then she continues to live with him so as to condone such cruelty, being at the time ignorant of his adultery, and if upon afterwards becoming aware of it, she takes action thereon, the condoned cruelty is so revived by the subsequent discovery of the adultery as to entitle her to petition for dissolution of marriage.<sup>6</sup>

I have endeavoured, without refining, clearly to explain the important doctrine of condonation and revival; for

<sup>5</sup> *Worsley v. Worsley*, 2 Lee, 572: *Durant v. Durant*, 1 Hagg. suppt. 765; *Bramwell v. Bramwell*, 3 Hagg. p. 635; *Palmer v. Palmer*, 2 S. & T. 61; *Dent v. Dent*, 4 S. & T. 105.

It has been held that cruelty to revive adultery may be less violent in degree than when it forms an original charge. In *Durant v. Durant*, 1 Hagg. p. 769, it was said that a groundless charge of misconduct and criminality, under pretence of which the husband turned his wife out of doors in the face of her family and her children, might suffice to revive his adultery often condoned by her.

<sup>6</sup> *Dempster v. Dempster*, 2 S. & T. 438; 31 L. J. P. & M. 20; *Waddell v. Waddell*, 2 S. & T. 584.

the question arises in some degree in the institution of almost every suit. It rarely happens—especially where the wife is complainant—that action is or can be taken upon the first discovery of adultery, or upon the first blow being struck.

The following case is a further illustration of the principles above laid down, though the question raised was rather in respect of an agreement not to sue than of condonation properly so called.

In *Newsome v. Newsome*,<sup>7</sup> the wife, having discovered that her husband had been guilty of incestuous adultery, entered into an agreement with him, by which, in consideration of his retiring from partnership with her father and brother, she agreed to forgive him, and not to take any proceedings in the Divorce Court; and though they were not to live together, they were to meet from time to time—and did so meet, but whether on those occasions, condonation took place by conjugal intercourse, was not clearly proved. The agreement also contained a clause that it should be binding only so long as the husband remained “true to the wife in love and duty.” He subsequently committed adultery, by which the Court held that the wife was set free from the agreement; that the incestuous adultery was thereby revived, and that she was therefore entitled to a divorce.

Conditional agreement to forgive incestuous adultery.

To collude is to conspire in a fraud: the parties to a Collusion. cause are guilty of collusion when they are acting in concert together, either by keeping back evidence of what would be a good defence; by agreeing to prove a real case; or by agreeing to set up a false one.

Collusion may be found by the Court on the evidence adduced in relation to the petition,<sup>8</sup> as in *Lloyd v. Lloyd* and *Chichester*,<sup>9</sup> in which case the adultery of the

<sup>7</sup> L. R. 2 P. & D. 306.

<sup>8</sup> Divorce Act, s. 30.

<sup>9</sup> 1 S. & T. 567. Any communication between the opposite parties with



respondent was clearly proved ; but it appeared that the petitioner had bargained for and had received a sum of money from the respondent's father on signing the petition, and that the agent employed by the petitioner to get up the evidence had been living familiarly with the respondent and co-respondent, and had advanced money to the latter : it was held that the evidence of collusion was too gross and palpable to be overlooked, and the petition was dismissed.<sup>1</sup>

Again, in *Todd v. Todd*,<sup>2</sup> the wife's suit for dissolution of marriage, it was shown that the adultery charged was committed by the husband in fulfilment of a promise previously made by him to the petitioner that he would give her an opportunity of obtaining a divorce ; that the adultery had been committed in order that it might be proved ; that evidence of it had been obtained by means of information supplied to the wife by the husband ; and that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him : her petition was dismissed.

The Court has not often, however, the means of discovering collusion, and it is therefore more particularly the subject of intervention by the Queen's Proctor upon information given to him by any person interested in the suit.

In *Dering v. Dering and Blakely*,<sup>3</sup> it was held that the

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the view of facilitating the proceedings should be avoided as it may give rise to a suspicion of collusion. In *Harris v. Harris & Lambert*, 4 S. & T. 232, the respondent, who did not appear in the suit, gave the petitioner's attorney a photograph to aid in proving her identity, and attended in Court for the same purpose, for which she received from the petitioner's attorney £1. The Court, upon consideration, having no reason to believe that the parties were acting in collusion, made the decree.

<sup>1</sup> And see *Chisim's case*, Macqueen's Practice of the House of Lords, p. 582.

<sup>2</sup> L. R. 1 P. & D. 121 ; 35 L. J. P. & M. 34.

<sup>3</sup> The Queen's Proctor and others intervening, L. R. 1 P. & D. 531 ; 37 L. J. P. & M. 35.

Queen's Proctor may bring collusion and all other matters before the Court in one plea.

When the Queen's Proctor charges collusion and the suppression of material facts, he is bound to furnish particulars of such charges.<sup>4</sup>

In *Cox v. Cox*,<sup>5</sup> cause was shown by the Attorney-General against the decree being made absolute on the ground that the petitioner's suit had been chiefly conducted by the managing clerk of the attorney who had entered an appearance on behalf of the respondent; but on explanation the charge of collusion was not sustained.

The fact that a husband makes his wife an allowance in lieu of alimony whilst a divorce suit is pending is not of itself proof of collusion.

But in *Barnes v. Barnes* and *Grimwade*,<sup>6</sup> it appeared that the husband had several interviews with his wife both before and after he presented his petition for dissolution of marriage, and at those interviews, gave her money and urged her not to oppose the petition; and promised that if she kept quiet, he would do no harm to the co-respondent, and would be a friend to her after the decree was obtained: collusion was held to have been proved, the respondent and the co-respondent not having appeared at the hearing of the cause.

#### DISCRETIONARY BARS.

Adultery proved to have been committed by the petitioner at any time during the marriage—except in rare cases, under special circumstances to be presently stated—is practically a bar to a suit for dissolution of

Adultery  
of the  
petitioner.

<sup>4</sup> *Jessop v. Jessop*, 2 S. & T. 301; *Gladstone v. Gladstone*, L. R. 3 P. & D. 260.

<sup>5</sup> 2 S. & T. 306.

<sup>6</sup> The Queen's Proctor intervening, L. R. 1 P. & D. 565; 37 L. J. P. & M. 4.

marriage or for judicial separation on the ground of any matrimonial offence on the part of the respondent.

In *Drummond v. Drummond*,<sup>6</sup> the wife petitioned for dissolution of marriage on the grounds of adultery and cruelty, to which the respondent did not appear; but the Queen's Proctor intervened and alleged her adultery since the filing of the petition. Leave was then asked to amend the petition by praying for a judicial separation, but the Court would not allow the Queen's Proctor's right to intervene to be so defeated. The cruelty only of the respondent was proved, and the petitioner's adultery. It was argued that she was nevertheless entitled to a decree on the ground of cruelty: but the Court dismissed her petition, holding that a wife guilty of adultery cannot be a petitioner in the Divorce Court on the ground of any matrimonial offence of the husband.

In *Latour v. Latour and Weston*,<sup>7</sup> the petitioner had obtained a decree for a divorce *a mensa et toro* from the Ecclesiastical Court in 1838, and from that time, his wife had continued to live with the adulterer. The petitioner, treating himself as thus divorced from his wife, had since lived and cohabited with another woman. After the passing of the Divorce Act, he petitioned in April, 1859, for a dissolution of his marriage, and without in any way adverting to his own adultery, obtained a decree *nisi*. But the Queen's Proctor intervened, and the petitioner's adultery having been proved—though it was strenuously contended that such adultery could in no way have contributed to his wife's misconduct, and was under circumstances of great mitigation—the Court held that it was not a fit case for Its discretion, and dismissed the petition.

In *Barnes v. Barnes and Beaumont*,<sup>8</sup> the jury found

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<sup>6</sup> 2 S. & T. 269.

<sup>7</sup> 2 S. & T. 524; 31 L. J. P. & M. 66; and on appeal, as *Latour v. The Queen's Proctor*, 10 H. of L. cas. 685.

<sup>8</sup> L. R. 1 P. & D. 572; 38 L. J. P. & M. 10.

that the respondent had committed adultery with the co-respondent, and that the petitioner had also committed adultery, but they could not say where or with whom, or whether it was with the knowledge or consent of the respondent. The co-respondent having obtained an order for a new trial, the Court intimated that the petitioner might also have a new trial on the question of his adultery, but he refused it. On motion for a decree, the Court declined to exercise Its discretion by passing over the verdict of the jury or by pronouncing a decree in favour of the petitioner notwithstanding the verdict.

When the Queen's Proctor intervenes after a decree *nisi*, he may allege acts of adultery which have already been the subject of a countercharge, provided that he alleges other acts of adultery, and is able to produce evidence of them.

In *Gladstone v. Gladstone*,<sup>9</sup> a petition by the wife for dissolution of marriage, the husband made a countercharge against her of adultery with B. The jury found a verdict for the petitioner. The Queen's Proctor afterwards intervened, and charged the petitioner with collusion and with suppression of material facts, and with adultery with B. and with other men. The Court refused to strike out the charge of adultery with B. because the Queen's Proctor charged, and on the trial produced evidence of, other acts of adultery with B. besides those which had been charged by the respondent, and of which he had produced evidence. On the trial the Judge Ordinary directed the jury that they must take into consideration, not only the additional evidence then produced, but also the evidence produced on the former trial in combination with such additional evidence, in determining whether the petitioner was guilty of adultery with B.

Even a single act of adultery may suffice. In *Clarke v.* Single act sufficient.

<sup>9</sup> L. R. 3 P. & D. 260.

*Clarke and Clarke*,<sup>1</sup> the petitioner, after his case had been proved, tendered himself for examination, and stated that on one occasion during a temporary separation from the respondent, he had been guilty of adultery with a woman whom he had never seen before or since. The Court, somewhat reluctantly, dismissed his petition.

Need not  
have con-  
ducted to  
respon-  
dent's  
adultery.

Nor is it necessary that the adultery of the petitioner should have in any way conducted to that of the respondent.

In *Morgan v. Morgan and Porter*,<sup>2</sup> the petitioner had, some years before instituting his suit, been guilty of adultery, though at that time unknown to the wife: there being no special circumstances in the case, beyond mere lapse of time, to justify the exercise of its discretion, the Court refused a decree.

Effect of  
condona-  
tion.

Although the adultery of the petitioner may have been condoned by continued cohabitation, the petitioner does not thereby necessarily become *rectus in curiâ*, so as to preclude the Court from taking such adultery into consideration. In *Goode v. Goode and Hamson*<sup>3</sup> the husband and wife having quarrelled, the husband left her and formed an adulterous connection with a young woman by whom he had a child. They afterwards became reconciled and lived together, but unhappily, the husband often treating his wife with great violence, until at length she went away, and committed adultery with the co-respondent. The Court, looking at all the circumstances, dismissed the petition.

<sup>1</sup> 34 L. J. P. & M. 94.

<sup>2</sup> L. R. 1 P. & D. 644; 38 L. J. P & M. 41. In this case the Judge Ordinary, in reviewing the previous decisions, observed that "in cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce on the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse."

<sup>3</sup> 2 S. & T. 253.

In *McCord v. McCord, Ogle, and Coxon*,<sup>4</sup> the petitioner had on one occasion since his marriage, committed adultery with a woman with whom he had cohabited before marriage. The fact became known to the respondent soon afterwards, and was by her forgiven, and her cohabitation with her husband was continued for some considerable time. On the husband subsequently petitioning for a decree of dissolution of marriage on the ground of the respondent's adultery, the Court held that the condonation by the respondent was not a fact to justify It in exercising its discretion in favour of the petitioner, and dismissed the petition.<sup>5</sup>

Upon this question, however, a distinction may be drawn between suits for dissolution of marriage and for judicial separation, and an act of adultery might not be so strongly pressed against a petitioner for the lesser remedy as against one who prays for a complete divorce.<sup>6</sup>

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<sup>4</sup> L. R. 3 P. & D. 237; 44 L. J. P. & M. 38.

<sup>5</sup> The Judge Ordinary, after observing that he could see nothing in this case which should lead him to make this petitioner an exception to the rule, said:—"His wife belonged to a profession in which she was exposed to great temptations; within eighteen months of his marriage he was unfaithful to her, and I cannot think that his conduct was the more venial because adultery was committed with his former mistress. Though the respondent forgave him, it appears in the highest degree probable that his conduct tended to weaken her sense of the obligation of the marriage contract, and so conduced to her guilt."

This reasoning will remind the readers of "Boswell," of an argument between him and Dr. Johnson, respecting a certain lady, who maintained that her husband having been guilty of numberless infidelities, released her from conjugal obligations, because they were reciprocal, &c., which Dr. Johnson ended by saying: "This lady of yours, Sir, I think, is very fit for a brothel." The "rough moralist" always maintained the boundless difference between infidelity in husbands and in wives. See Boswell's "Life of Johnson," edit. 1847, pp. 502 and 636, and note by Croker.

<sup>6</sup> In *Seller v. Seller*, 1 S. & T. 482, the husband had condoned his wife's adultery—in respect of which he had obtained a divorce *a mensâ et toro*—by renewed cohabitation: the wife afterwards petitioned for judicial separation on the ground of his adultery; and it was held on demurrer that her adultery, having been condoned, was no bar to her suit. This

But there certainly may be cases in which an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent; for otherwise, a sort of licence to commit adultery without punishment would be set up on one side by guilt on the other.<sup>7</sup> It was probably on this ground, and in order to meet the case of some temporary and comparatively venial lapse on the part of a husband—for a lapse on the part of a wife can never be venial—that the discretionary power was vested in the Court of overlooking the adultery of the petitioner.

Cases in which the Court has exercised its discretion.

The following are the classes of cases in which this discretion has been exercised.

In *Coleman v. Coleman*,<sup>8</sup> the wife's suit for dissolution of marriage, it was proved that the respondent had been guilty of adultery and cruelty, and also that he had by threats and by personal violence coerced the petitioner into leading a life of prostitution, and had lived upon the money which she so obtained. The Court being satisfied that she had led this life contrary to her own will and desire, and in consequence of the coercion of the respondent, granted her a decree notwithstanding her adultery.

In *Joseph v. Joseph and Wentzell*,<sup>9</sup> the husband having instituted a suit for dissolution of marriage, was led to

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case was decided on the authority of *Anichini v. Anichini*, 2 Curt. 210, in which the wife sued for restitution of conjugal rights: the husband pleaded her adultery, and prayed a divorce: the wife then recriminated: the husband replied, condonation of his guilt. Dr. Lushington decided that the adultery of the husband, having been condoned, was no bar to his prayer for divorce on account of the adultery of the wife, which was accordingly decreed.

<sup>7</sup> See *Anichini v. Anichini*, 2 Curt. pp. 218-9; *Morgan v. Morgan & Porter*, L. R. 1 P. & D. p. 646; 38 L. J. P. & M. p. 42.

<sup>8</sup> L. P. 1 P. & D. 81; 35 L. J. P. & M. 37.

<sup>9</sup> 34 L. J. P. & M. 96.

believe that his wife was dead, and acting on that belief, married again ; but afterwards, finding that she was still alive, proceeded with his suit. The Court being satisfied that his adultery had been committed under the *bonâ fide* impression that his wife was dead, granted a decree.

Again, in *Noble v. Noble and Godman*,<sup>1</sup> after a decree *nisi* had been pronounced, but before the decree was made absolute, the petitioner went through a form of marriage, and cohabited with a female. The Court being satisfied that he had done so in ignorance of the law, and in the *bonâ fide* belief that his first marriage was finally dissolved, determined that it was a case in which It could exercise its discretion in favour of the petitioner, and made the decree absolute.

In the remarkable case of *Conradi v. Conradi and others*,<sup>2</sup> the petitioner established his wife's adultery, but the co-respondent proved that the petitioner had committed adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents : the Queen's Proctor intervened, and alleged the judgment against the petitioner in the previous suit,<sup>3</sup> and further, the fact of the petitioner's adultery. The jury found a verdict in favour of the petitioner. The Court, however, held that the judgment in the former suit was conclusive evidence of the petitioner's adultery ; but in the exercise of its discretion, granted a decree *nisi*, notwithstanding that judgment, on the grounds that the act of adultery, if committed, had been an isolated one ; that it had no

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<sup>1</sup> The Queen's Proctor intervening, L. R. 1 P. & D. 691; 38 L. J. P. & M. 52.

<sup>2</sup> The Queen's Proctor intervening, L. R. 1 P. & D. 514; 37 L. J. P. & M. 55.

<sup>3</sup> This allegation had been demurred to, but the demurrer was overruled on the ground that whether the finding in the previous suit were admissible or not, it was a material fact for the consideration of the Court. L. R. 1 P. & D. 391; 36 L. J. P. & M. 68.



connection whatever with the desertion by the respondent of her home, nor with her abandoned life; and that the finding of the jury in the second suit, acquitting the petitioner, had thrown doubt upon his guilt.

Adultery  
of peti-  
tioner  
after  
decree  
*nisi*.

As the decree *nisi* and the decree absolute are the beginning and ending of the same act, and as the marriage remains undissolved until the decree absolute, the obligations in respect of adultery equally remain. The Queen's Proctor may therefore intervene and allege adultery committed between the decrees.<sup>4</sup>

Proof of  
identity.

Upon an issue of adultery raised by the Queen's Proctor intervening to show cause against a decree *nisi* being made absolute, the Court has held that It will not require such strict proof of the identity of the person charged with adultery as upon the trial of such an issue in a suit between husband and wife.<sup>5</sup>

Unreason-  
able delay.

Unreasonable delay as a bar to a suit for dissolution of marriage, as intended by the 31st section of the Divorce Act, must be taken to mean that kind of delay which would show the petitioner to have been insensible to the loss of his wife: it must be a culpable delay, so as to be almost equivalent to connivance or acquiescence; or such as to lead the Court to infer condonation or a want of sincerity in the purpose for which the suit is instituted.<sup>6</sup>

<sup>4</sup> *Hulse v. Hulse & Tavernor*, the Queen's Proctor intervening, L. R. 2 P. & D. 259; 40 L. J. P. & M. 51.

<sup>5</sup> In *Hulse v. Hulse & Tavernor*, the Queen's Proctor intervening, L. R. 2 P. & D. 357; 41 L. J. P. & M. 19, the petitioner having obtained a decree *nisi*, the Queen's Proctor charged him with adultery, giving him full particulars of the time when, the place where, and the person with whom he was alleged to have committed adultery, and evidence being given that a person passing by the petitioner's name, and giving a card with the petitioner's name printed upon it, had been guilty of the alleged acts of adultery, the Court held that there was *prima facie* evidence of identity, and in the absence of evidence to rebut it, found the petitioner guilty, and dismissed the petition.

<sup>6</sup> *Best v. Best*, 2 Phill. 161; *Ratcliffe v. Ratcliffe & Anderson*, 1 S. & T. 473; *Pellew v. Pellew & Berkeley*, 1 S. & T. 553; *Tollemache v. Tollemache*, 1 S. & T. 557; *Harrison v. Harrison*, 3 S. & T. 362. In *Nicholson v.*

Generally speaking, however, delay can be explained and satisfactorily accounted for, and cannot in any case be justly imputed to a petitioner, whether husband or wife, who has been unable to proceed from want of means or other inevitable or justifiable circumstances.

In *Newman v. Newman*,<sup>7</sup> the wife separated from her husband in 1850 by reason of his incestuous adultery with her sister, and in 1868 she petitioned for dissolution of marriage on that ground. In explanation of the delay in instituting proceedings, she stated that her mother was very reluctant to have the scandal in the family exposed, and that she yielded to her mother's urgent entreaties, but that on her mother's death she presented her petition. The Court held that though there had been unreasonable delay, yet, looking at all the circumstances of the case, the petitioner was entitled to a decree.

But in *Short v. Short* and *Bolwell*,<sup>8</sup> the husband had discovered his wife in adultery with the co-respondent in September, 1859, and immediately separated from her, but did not file his petition for dissolution of marriage till July, 1873. He was a coal-hauler, and it appeared that, although he had commenced his business with very small means, he had carried it on for some years with such success, that, at the time of presenting his petition, he had stock-in-trade of the value of about £600, and nine horses, besides some cottages which he had purchased through a building society. The Court refused to accept want of means as a sufficient explanation of the time which he had allowed to elapse before taking proceedings, and dismissed the petition.

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*Nicholson*, L. R. 3 P. & D. 53, a suit by the wife on the grounds of adultery and cruelty, the Court expressed an opinion that a delay of two years in instituting proceedings, unless with some sufficient reason for such delay, might be a ground for dismissing the petition.

<sup>7</sup> L. R. 2 P. & D. 57; 39 L. J. P. & M. 36.

<sup>8</sup> L. R. 3 P. & D. 193.

In suits for  
judicial  
separation.

In suits for judicial separation, delay, though it cannot be pleaded as a bar, may be taken into consideration by the Court; and its true effect in these suits was well expounded by Lord Stowell in *Mortimer v. Mortimer*:<sup>9</sup> "The first thing which the Court looks to when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact charged and known by the party; because if the interval be very long between the date and knowledge of the facts, and the exhibition of them to this Court, It will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and It will be inclined to infer either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay in order to take it out of the reach of such interpretations."

In *Boulting v. Boulting*,<sup>1</sup> the parties were married in 1833, and from and after 1835 lived apart under an ordinary separation deed, by virtue of which the husband made his wife an allowance. About 1842, he commenced an adulterous cohabitation with a woman, of which the wife became aware in 1843, and which continued to the time of the hearing of her suit for judicial separation on the ground of that adultery, in 1863. The Judge Ordinary, in giving judgment, observed:—"The petitioner must feel and suffer under the wrong of which complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. . . . But the Court looks in vain for any legitimate cause why she should suddenly regard her husband's conduct now in any different light from that of past days. Her husband has not interfered with her, has not changed his conduct towards her, or his own mode of life. . . . Does the wife desire separation?"

<sup>9</sup> 2 Consist. 313.

<sup>1</sup> 3 S. & T. 329.

She has it, in fact, already. Does she require support? She has that too, and upon terms arranged by herself. The Court cannot believe in the sincerity of such a suit, and must withhold from Mrs. Boulting any relief now founded upon an adulterous connection over which for years she seems to have 'slumbered with sufficient comfort.'"

The same principle is applied to suits on the ground of In cases of cruelty; for as the reason of the Court's interposition in such cases is the necessity of giving relief to the suffering party, lapse of time between the acts complained of and the institution of the suit will be taken into consideration if it appears that the suit is not in a legal sense sincere; but that it has been instituted not for the protection of the petitioner's person, but for some collateral purpose.

In *Matthews v. Matthews*<sup>2</sup> the parties having been married in 1844, lived together till 1853, when a deed of separation reciting mutual differences was executed, and the cohabitation ceased. In 1856, the wife petitioned for judicial separation, and proved certain acts of cruelty. The Court dismissed the petition, as it appeared that the proceedings were not for the *bonâ fide* purpose of protecting the wife from the cruelty of her husband, but to put herself in a better position with respect to certain property than she occupied under the deed of separation.

But in the subsequent case of *Cooke v. Cooke*,<sup>3</sup> the

<sup>2</sup> 1 S. & T. 499; on appeal, 3 S. & T. 161; 29 L. J. P. & M. 118, 120.

In *Williams v. Williams*, L. R. 1 P. & D. 178; 35 L. J. P. & D. 85, the husband, in answer to the wife's petition on the ground of cruelty, pleaded a traverse and condonation, and that the petitioner had executed a deed of separation under which he had paid her a certain allowance, and "that by reason of the premises the petitioner was not entitled to sue for a judicial separation;" and further that the suit was not instituted *bonâ fide*, but for the purpose of obtaining an increased allowance. The Court allowed these paragraphs to stand, but directed that the words "that by reason of the premises the petitioner is not entitled to sue," &c., should be struck out.

<sup>3</sup> 3 S. & T. 126; and on appeal, 246.

wife, after leaving and returning to her husband's house on various occasions, finally separated from him in 1856 by reason of his cruelty. In 1857, an agreement was come to by the mediation of friends, that she should pay her husband a portion of income settled to her separate use, and that he should allow the children to visit her from time to time. She paid the money, but in the early part of 1862, three years had elapsed since he had allowed the children to visit her, and he then refused, though she was very ill. In July, 1862, she petitioned for judicial separation. The Court gave judgment in her favour, being of opinion that the reluctance of the wife to prosecute the suit against her husband was no bar to her proceeding, for it appeared that she was willing to have lived with him if she could have done so with due regard to her personal safety; and that as she could not have such access to her children as she was entitled to have unless she either returned to live with her husband, or was separated from him by judicial sentence—and her evidence showed that she had reasonable ground for apprehending personal violence if she did return to him—that she was well warranted in prosecuting her suit, though one object of it might be the gaining access to her children from which she was debarred by fear of personal violence if she returned to cohabitation.

Cruelty.

Although cruelty could not be pleaded in bar of a divorce *a mensâ et toro* on the principle that it cannot justify the violation of the marriage bed;<sup>4</sup> the Court may withhold from a petitioner guilty of such misconduct, a decree of dissolution of marriage, especially if it appear that the infidelity of the respondent had been brought about by such cruelty.

In *Pearman v. Pearman* and *Burgess*,<sup>5</sup> however, the

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<sup>4</sup> *Chambers v. Chambers*, 1 Consist. p. 452.

<sup>5</sup> 1 S. & T. 601.

husband's petition on the ground of his wife's adultery, to which she alleged cruelty on his part, and both charges were proved; but it appeared that the husband's violence towards her had in no way contributed to her adultery, but had been provoked by her drunken habits: the Court dissolved the marriage.

Cruelty, then, as a bar to a suit for dissolution of marriage, must in general be such as has conduced to the respondent's adultery. A husband, who by his causeless ill-treatment of his wife drives her to seek protection from his violence in the arms of another man, has little reason to complain afterwards of her adultery.

Nor is the Court precluded from taking such cruelty into consideration by the fact that it has been condoned by continued cohabitation.<sup>6</sup>

The language used in this proviso is of great latitude, and opens a wide extent of inquiry for the discretion of the Court.<sup>7</sup> Desertion, as a ground for divorce, has been fully explained under that head, but as a discretionary bar, it is not limited to any particular duration of time, and seems, when applied to the husband, to be equivalent

Desertion  
or wilful  
separation  
without  
reasonable  
excuse.

<sup>6</sup> See the judgment of Sir C. Cresswell in *Goode v. Goode & Hamson*, 2 S. & T. pp. 257-8.

<sup>7</sup> The following observations of Lord Penzance seem to apply equally to this as to the next and last discretionary bar:—

“The subject could not well have been otherwise treated. The shape or form that the petitioner's misconduct in married life may take, its degree, the length of its duration, its incidents of mitigation or aggravation, its causes and effects—all these have or may have a bearing on the petitioner's just claim to relief, and yet are capable of such infinite variety and intensity, that they escape distinct expression, and refuse to be fixed in a positive and detailed enactment. The duty of weighing these matters has therefore been cast upon the Court. . . . But the same reasons which have served to make the Legislature express itself with latitude ought to make the Court cautious in restricting itself by precedent. One main end of the Legislature in these provisions was this—that a wife should not first be the object of neglect and ill-treatment, and then the victim of the husband's own wrong.” *Proctor v. Proctor & others*, 4 S. & T. p. 142.

to leaving the wife destitute ; and if without excuse, is a strong reason for withholding a decree, inasmuch as it may have led to the adultery complained of.<sup>8</sup>

In *Yeatman v. Yeatman and Rummell*,<sup>9</sup> the husband's petition for dissolution of marriage, the adultery of the respondent was proved ; but as she had previously obtained a decree of judicial separation on the ground of his desertion, the Court dismissed his petition, observing that nothing is more likely to conduce to adultery than throwing a young wife on the world without the protection of her husband.

With respect to separation without reasonable excuse : the separation must have been wilful ; the excuse, if any, unreasonable, to justify the Court in refusing a decree.<sup>1</sup>

The separation may have been involuntary as well as reasonable, as in the case of *Du Terreaux v. Du Terreaux*,<sup>2</sup> where the petitioner, when only in her seventeenth year, went out early one morning and was married, without the knowledge of her family, to the respondent by

<sup>8</sup> Although desertion could not, in the Ecclesiastical Courts, be pleaded in bar of a divorce on the ground of adultery, the question was discussed in several cases where *malicious desertion*, as it was termed, might not disentitle the petitioner to a decree. See *Reeves v. Reeves*, 2 Phill. 125 ; *Sullivan v. Sullivan*, 2 Add. 299 ; *Morgan v. Morgan*, 2 Curt. p. 688 ; *Clowes v. Clowes*, 4 N. of C. 1.

<sup>9</sup> L. R. 2 P. & D. 187 ; 39 L. J. P. & M. 77.

<sup>1</sup> As in *Coulthart v. Coulthart & Gouthwaite*, 28 L. J. P. & M. 21, where the petitioner married a woman whom at the time he well knew to be a prostitute. Soon after the marriage, they went to stay at the house of the petitioner's father, whence, in a few weeks, they were obliged to remove in consequence of the wife showing bad temper, and making herself disagreeable to the family. A few days afterwards, the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means and not supplying her with any during his absence of four years. In the meanwhile the wife, after making herself very unpleasant to the husband's family, resumed her former way of life. The Court held that the separation had been wholly unjustifiable and dismissed the petition.

<sup>2</sup> 1 S. & T. 555.

cence. She returned home the same morning and informed her mother of her marriage. Inquiries were made respecting her husband, and it being ascertained that he was not a suitable husband for her, she was sent to the Continent where she remained two or three years. Her husband made no attempt to cohabit with her, and subsequently committed bigamy. The Court being of opinion that the petitioner must from the circumstances of the case have been entrapped into the marriage, held that this was a reasonable excuse for the separation, and granted a decree.

The separation may have been wilful, though with reasonable excuse, as in *Haswell v. Haswell and Sanderson*,<sup>3</sup> where the petitioner found his wife submitting to indecent liberties from a man, and on that ground did not return to her mother's house where she resided. She afterwards committed adultery with the co-respondent. It was held that the petitioner had good reason for separating from her, and was entitled to a decree.

Again in *Proctor v. Proctor, Smith and Pitman*,<sup>4</sup> the petitioner, being then dependent on his father, a clergyman, and having taken his degree at Cambridge, married in London in June, 1863, a woman who had been living as a prostitute in Cambridge. There was no cohabitation, and immediately after the marriage the respondent returned to Cambridge, where in the early part of 1864, she committed adultery. The petitioner's father having in the meantime discovered the marriage; in October, 1863, a deed of separation was executed, under which £1 a week was secured and paid to the respondent. The Court held that the position in which the petitioner was placed under his father and his want of means hardly left him an alternative, and that the separation, if wilful, might with good reason be excused.

Or, the separation may have been for some good pur-

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<sup>3</sup> 1 S. & T. 502.

<sup>4</sup> 4 S. & T. 140 ; 34 L. J. 99.



pose; for the mere absence of the husband will not justify the wife in committing adultery.

In *Wilton v. Wilton and Chamberlain*,<sup>5</sup> the petitioner after an act of adultery by his wife, received her back, and then went to Australia to see what prospect there might be of settling there, leaving his wife for a time in a residence close to her own mother, where she again committed adultery. The Court held that the husband's absence was warranted, and dissolved the marriage.

Again, in *Davies v. Davies and Hughes*,<sup>6</sup> the parties were in domestic service in the same family at Wolverhampton at the time of their marriage: the husband shortly after left the service, and in order to better himself, got a place in London, leaving his wife in the same service, where she soon began to show a partiality for his successor, the co-respondent, with whom she afterwards lived in open adultery. As there was nothing to show that the husband's absence was unreasonable, the Court made a decree in his favour.

But, on the other hand, the wife has a right to the comfort and support of her husband's society, the security of his home and name, and the first protection of his presence so far as his position and avocations will permit.

In *Jeffreys v. Jeffreys and Smith*,<sup>7</sup> the husband, who was a butler in service, after cohabiting with his wife for ten years—from 1844 to 1854—by frequently visiting her, left her altogether, though he continued to provide for her till about four or five years before filing his petition for dissolution of marriage on the ground of her adultery with the co-respondent, who had lodged in the same house with her. As it appeared that the petitioner had no good cause for withdrawing himself from his wife's society, and thus exposing her to temptation—for he had

<sup>5</sup> 1 S. & T. 563.

<sup>6</sup> 3 S. & T. 221; 32 L. J. 111.

<sup>7</sup> 3 S. & T. 493; 33 L. J. 84.

no reason to suspect her with Smith until some time after he had deserted her—the Court held that he had so far compromised himself as to forfeit his claim to a divorce.

The cause of, or excuse for “desertion” therefore—  
 and these remarks apply to suits on that ground to which  
 the respondent may plead “reasonable excuse” must  
 have been “reasonable;” not necessarily involving a  
 distinct matrimonial offence on which a decree of separation or divorce could be founded; but it must be grave and weighty—mere frailty of temper and habits distasteful to a husband are not reasonable ground for depriving a wife of the protection of his home and society.<sup>8</sup>

What is  
 reasonable  
 excuse for  
 desertion.

In the very peculiar case of *Ousey v. Ousey* and *Atkinson*,<sup>9</sup> the husband petitioning for dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The respondent admitted the fact of non-consummation, and alleged that the petitioner was to blame for it owing to his physical incapacity. The Court, without deciding the question of fact whether the non-consummation was the fault of the petitioner or the respondent, came to the conclusion that the petitioner had acted under a *bond fide* belief that the respondent had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution of marriage.

The considerations applicable to this proviso may be  
 reduced under two heads; for there may have been  
 neglect more or less wilful without actual misconduct.  
 Such neglect or misconduct is neglect or misconduct in

Wilful  
 neglect or  
 misconduct  
 conducting to  
 adultery.

<sup>8</sup> See *Haswell v. Haswell & Sanderson*, 1 S. & T. 502; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; 37 L. J. P. & M. 37.

<sup>9</sup> L. R. 3 P. & D. 223; 43 L. J. P. & M. 35.

the marital capacity, and must be a breach of some marital duty towards the other party, and conducing in some way to the adultery complained of.

In *Cunnington v. Cunnington and Noble*,<sup>1</sup> the petitioner at the time of his marriage, in 1849, was a clerk in the General Post Office, at a salary of £80 a year: his wife and he lived very happily till November in the following year, when he was apprehended on a charge of having feloniously opened a letter and taken a shilling from it; was tried, found guilty, and sentenced to ten years' transportation. After being confined in several prisons, he was sent to the convict establishment at Dartmoor. He had no means of making any provision for his wife, but during more than two years he kept up an affectionate correspondence with her by letter. Her family supplied her with the means of decent subsistence, and she led a very reputable life till 1853, when she formed a connection with the co-respondent who lodged in the same house with her, by whom she had a child, and of which she informed her husband in 1855. On being discharged from prison he petitioned for a divorce. The Court held that although the adultery would probably never have happened but for the misconduct of the husband, for which he was prosecuted, it was not such misconduct as had conduced either directly or indirectly to the adultery, and that the petitioner was therefore entitled to a decree.

Again, in the case of *Beavan v. Beavan*,<sup>2</sup> the petitioner, an infant, married in November, 1860, a prostitute, several years older than himself: they lived together till December, when—the husband being a ward in Chancery—the parties were summoned before the Master of the Rolls, by whose order the husband was delivered to his guardian and sent abroad. The wife was interdicted

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<sup>1</sup> 1 S. & T. 475.

<sup>2</sup> 2 S. & T. 652; 32 L. J. 36.

from all intercourse or communication with him. She remained in the same lodgings in which she had cohabited with him till July, 1861, and there was no proof of any misconduct on her part while there. She applied to her husband's family for money, but received none; and subsequently committed adultery. It was held that the petitioner—whose suit was conducted by his guardian—was entitled to a decree; Sir C. Cresswell observing that “it would be a very bad example if this Court were to hold out that, whenever a prostitute inveigles a boy into marriage, his family is bound to maintain her.”<sup>3</sup>

Further; the neglect or misconduct intended by the proviso is not constituted by mere carelessness on the part of a husband—the mere omission to do something which ought to have been done. Some men are very watchful and suspicious, others confiding and unobservant; and therefore, before a husband can be found guilty of such neglect of, or misconduct towards his wife as has conducted to her adultery, there must be satisfactory evidence that he was aware that the intimacy between his wife and the adulterer was of such a character as to be distinctly dangerous; that he knew so much of it as to perceive the danger; and that he purposely or recklessly disregarded it and forebore to interfere. It is not necessary that a man should intend any wrong, but if he sees danger and recklessly allows his wife to remain exposed to that danger, although without intending any wrong, he is guilty of neglect. It is for the public interest, indeed, that a husband who has himself thrown his wife into

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<sup>3</sup> This case, however, seems to fall more properly under the preceding proviso, as one of separation, though not wilful. It is obvious that there may be neglect without separation, though there could hardly be “wilful” separation without neglect, unless on some justifiable ground.

In *Reeves v. Reeves*, 2 Phill. 125, the husband, a minor dependent on his father, had married a prostitute, but suspecting her of adultery left her. She having no means of support, resorted to prostitution: he was held entitled to his divorce.

temptation and exposed her to the addresses of other men should not be allowed to cast her aside after she has yielded to temptation.<sup>4</sup>

In order, however, to justify the Court in withholding from a husband his remedy for his wife's adultery, it is not sufficient to show that some conduct on his part has conduced to any particular act of adultery after an adulterous intercourse has once been established, but it must be proved that he has so acted as to bring about that intercourse—that he has been guilty of such wilful neglect or misconduct as has conduced to the wife's first fall from virtue, and not merely of neglect conducing to any particular act of adultery subsequent to her fall.<sup>5</sup>

“It has been sometimes supposed that if a man chooses to marry an immodest woman he cannot afterwards free himself from her by reason of her unchastity. But whatever the previous life of a woman may have been, she binds herself by marriage to chastity, and if she breaks the conditions of marriage, her husband is entitled to claim its dissolution. But, on the other hand, a husband is at all times bound to accord to his wife the protection of his name, his home, and his society, and certainly not

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<sup>4</sup> The husband is under an obligation to protect his wife from all associations which may expose her purity to hazard. Therefore if he introduces his wife to society so abandoned and exposes her to risks so great as to render a deviation from the paths of chastity a probable if not the necessary consequence, the Court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct when the adulterous connection arose from the society and temptations to which he had introduced his wife; but the mere introduction of a wife to and allowing her to associate with a woman living in a state of concubinage, whose general conduct may be quite consistent with decorum, cannot affect the husband's right to a divorce on the ground of the wife's adultery wholly unconnected with such an acquaintance. See *Harris v. Harris*, 2 Hagg. pp. 376, 415, 511; *Graves v. Graves*, 3 Curt. 235.

<sup>5</sup> See the judgments of Lord Penzance in *Dering v. Dering & Blakeley*, the Queen's Proctor and others intervening, L. R. 1 P. & D. 531, 37 L. J. P. & M. 52; *St. Paul v. St. Paul & Farquhar*, the Queen's Proctor intervening, L. R. 1 P. & D. 739; 38 L. J. P. & M. 57.

the less so where the previous life of his wife renders her peculiarly accessible to temptation.<sup>6</sup> No man is justified in turning his wife from his house without reasonable cause, and then claiming a divorce on account of the misconduct to which he has by so doing conduced.”

The foregoing observations of Lord Penzance arose from the case of *Baylis v. Baylis, Teevan and Cooper*,<sup>7</sup> in which the petitioner having married a woman of loose character with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in the chambers he had occupied when a bachelor, and where she soon afterwards committed adultery. There was no evidence of any reasonable cause for the separation; and the Court dismissed the petition, being of opinion that the husband's conduct had conduced to the wife's adultery.

Although this discretionary bar is by the statute applicable only to suits for dissolution of marriage, the Court will apply it in cases where the evidence would otherwise justify a sentence of judicial separation: as in *Boreham v. Boreham*,<sup>8</sup> the wife's petition for dissolution of marriage on the grounds of adultery, cruelty, and desertion; and the Court found that the adultery only of the respondent was proved, and also that the petitioner had treated the respondent with cruelty; had wilfully separated herself from him before his adultery; and that she had been guilty of such wilful neglect and misconduct as had conduced to his adultery. The Court refused to

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<sup>6</sup> In *Dillon v. Dillon*, 3 Curt. 96, it was said that the circumstance that a man has married the woman that he has seduced can never operate as a justification for a wife's misconduct, nor excuse infidelity after marriage, nor bar the husband's redress; but, on the other hand, the husband is bound to exercise more than ordinary care that his wife does not deviate into the path of error into which he has been the first to lead her; his conduct therefore will be examined with more vigilant scrutiny than where no such connection has existed.

<sup>7</sup> L. R. 1 P. & D. 395; 36 L. J. P. & M. 89.

<sup>8</sup> L. R. 1 P. & D. 77; 35 L. J. P. & M. 49.

grant a decree of judicial separation on the ground of the husband's adultery, and dismissed the petition.<sup>9</sup>

Nor will the Court allow the prayer of the petition to be altered for the purpose of evading the proviso.

In *Lempriere v. Lempriere* and *Roebel*,<sup>1</sup> the husband's suit for dissolution of marriage, it was established that the respondent was guilty of adultery, and the husband of cruelty and misconduct conducing to her adultery. It was then contended that though his petition thus failed under the provisions of the Divorce Act, he might convert it into a petition for judicial separation; and that then, as his cruelty and misconduct would be no bar to his suit on account of his wife's adultery, he would be entitled to a decree. The Court refused to allow this to be done, and dismissed the petition.<sup>2</sup>

29 Vict.  
c. 32, s. 2.

Previously to the statute 29 Vict. c. 32, the Court had no power on a petition for dissolution of marriage to make a substantive decree in favour of the respondent; and a double suit was always necessary whenever the respondent had not only grounds of defence but also for asking relief.

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<sup>9</sup> In *Hughes v. Hughes*, L. R. 1 P. & D. 219; 35 L. J. P. & M. 94, the husband in answer to his wife's petition on the ground of adultery and cruelty, denied both these charges; and further alleged that the petitioner had habitually treated him with insolence and neglect, and frequently absented herself from home, and refused to inform him where she had been, and constantly set his orders and wishes at defiance; and that she had withdrawn herself from cohabitation for two years without reasonable cause. The Court refused to order those allegations to be struck out, being of opinion that the respondent was entitled to give evidence of them for the purpose of showing that his misconduct, if any, had been caused by that of the petitioner.

<sup>1</sup> L. R. 1 P. & D. 569; 37 L. J. P. & M. 78.

<sup>2</sup> This would seem to do away with the doctrine of *compensatio criminis*, which prevailed in the Ecclesiastical Courts, and according to which, a petitioner's suit founded on adultery was not barred by a countercharge of cruelty.

The question is still open for discussion, but it is not difficult to anticipate the result.

This difficulty has been partially removed by the second section of that act, by which, in any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty or desertion, or in case of such a suit instituted by a wife, on the ground of her adultery or cruelty; the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.<sup>3</sup>

In *Brown v. Brown* and *Shelton*,<sup>4</sup> the husband and wife lived apart under a deed of separation, by which a sufficient allowance was secured to the wife, and she was allowed to have the custody of her two daughters, with access to her son, who lived with his father. Subsequently the husband petitioned for a dissolution of marriage on the ground of his wife's adultery. She denied the adultery, and prayed for a judicial separation on the ground of acts of cruelty alleged to have taken place previously to the separation. The jury found that the respondent had not committed adultery, and that the petitioner had been guilty of cruelty. The Court held that the respondent was entitled to a decree of judicial separation.

#### WIFE'S COSTS AFTER SUIT.

The wife's right to costs in a suit for dissolution of marriage or for judicial separation depends upon her success or failure as petitioner or respondent.<sup>5</sup>

<sup>3</sup> It has been held that a decree of restitution of conjugal rights is not the "relief" for desertion intended by the above section; therefore a wife who filed an answer to a petition for dissolution of marriage wherein she denied the adultery charged and alleged desertion and wilful separation, was not allowed to add a prayer for restitution to the answer. *Drysdale v. Drysdale*, L. R. 1 P. & D. 365; 36 L. J. P. & M. 39.

<sup>4</sup> L. R. 3 P. & D. 202; 43 L. J. P. & M. 47.

<sup>5</sup> By the 51st section of the Divorce Act, the Court on the hearing of any suit, proceeding or petition under this Act . . . may make such order as to costs as to such Court may seem just. And see Rule 159 in Appendix.



When the  
wife is  
petitioner.

When a decree is pronounced at the suit of the wife, she is not entitled to her costs as a matter of course; but the Court usually goes on to order that the respondent be condemned in costs, whether an order has or has not been made upon him to deposit a sum in the registry or to give security. And she may be entitled to surplus costs beyond the sum paid into the registry; but not if she fail in her suit.<sup>6</sup>

When the wife's petition is dismissed on the ground of its having been improperly instituted, the Court may in the full discretion which It possesses with respect to costs, refuse to make any order against the husband for their payment, though he may have deposited a sum in the registry for that purpose.<sup>7</sup>

As, however, the broad principle on which the wife's costs are allowed is that, in most cases, she would not be able to obtain legal assistance unless her solicitor's costs were secured to him, the Court will only exercise Its power of disallowing her costs in cases where the solicitor has instituted proceedings without reasonable ground—that is, where he has had the means of seeing before

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<sup>6</sup> *Chetwynd v. Chetwynd*, 4 S. & T. 108; 34 L. J. 65; *Sopwith v. Sopwith*, 2 S. & T. 105.

<sup>7</sup> *Heal v. Heal*, L. R. 1 P. & D. 300; 36 L. J. P. & M. 62, where the wife's suit for judicial separation on the ground of cruelty was dismissed; and as she had a separate income larger than that of her husband, and the Court was of opinion that the suit had been improperly instituted, an order for the payment of her costs of the hearing was refused.

In *Ditchfield v. Ditchfield*, L. R. 1 P. & D. 729; 38 L. J. P. & M. 51, the wife's suit for nullity having failed, and the husband having paid her costs of that suit to the extent of the amount deposited in the registry, she subsequently petitioned for dissolution on the grounds of adultery and cruelty, and obtained a decree. The Court condemned the husband in the costs of the second suit, but allowed him to deduct therefrom the amount of the costs he had paid in the suit for nullity.

In *Jones v. Jones*, L. R. 2 P. & D. 333; 41 L. J. P. & M. 21 & 53, the full Court affirmed the decision of the Judge Ordinary refusing to order the husband to pay the wife's costs, her petition charging him with incestuous adultery having been dismissed as groundless.

instituting the suit, that it was one which ought not to be instituted.<sup>8</sup>

A woman who has obtained a decree *nisi* with costs is entitled to enforce payment of those costs from the respondent, notwithstanding the intervention of the Queen's Proctor before the decree is made absolute. But the Court will make no order upon the respondent to deposit a sum in the registry or to find security for her costs of trying the issues raised by the Queen's Proctor's intervention.<sup>9</sup>

In *Whitmore v. Whitmore*,<sup>1</sup> the wife having obtained a decree *nisi* with costs, the Queen's Proctor intervened, and proved her adultery pending the suit. She was held entitled to enforce the payment by the respondent of all costs which had been taxed, and ordered to be paid up to the date when she was found guilty of adultery, including the costs of the hearing, though they had not been taxed.

When the wife fails in her defence, she is not entitled to costs beyond the sum paid or secured;<sup>2</sup> and if her answer contains charges against her husband which at the trial turn out to have been made without any foundation, the costs occasioned by such charges will be disallowed.<sup>3</sup>

When she  
is respon-  
dent.

In *Wilson v. Wilson*,<sup>4</sup> the wife's costs of counter-charges of adultery against her husband, the petitioner, were disallowed, although they had been paid into Court, the evidence in support of those countercharges having been got up by detectives, and being utterly untrustworthy.

<sup>8</sup> See *Flower v. Flower*, L. R. 3 P. & D. 132; 42 L. J. P. & M. 45. In this case the Court allowed the wife's costs up to the amount (£60) for which security had been given.

<sup>9</sup> *Gladstone v. Gladstone*, L. R. 3 P. & D. 260; 44 L. J. P. & M. 46.

<sup>1</sup> L. R. 1 P. & D. 96; 35 L. J. P. & M. 39 & 52.

<sup>2</sup> *Glennie v. Glennie & Bowles*, 3 S. & T. 109.

<sup>3</sup> *Clark v. Clark & others*, 4 S. & T. 111; 34 L. J. 71.

<sup>4</sup> L. R. 2 P. & D. 435; 41 L. J. P. & M. 74.

If she establishes a defence to her husband's petition, she may, though found guilty, be entitled to costs;<sup>5</sup> and where the husband's petition was dismissed and the wife's costs exceeded the sum paid into the registry, she was held entitled to the balance.<sup>6</sup> Where cross suits were instituted, and the wife was found guilty of adultery, the husband was held not liable to pay the wife's costs in her suit, she not having had them taxed before the hearing.<sup>7</sup>

It has always been held that after a wife has been found guilty of adultery, it is too late for her to tax her costs against her husband;<sup>8</sup> but she may be entitled to enforce any order already obtained.

The procedure with respect to the wife's costs when the decision of the Court or the jury is against her, is now regulated by Rule 159.<sup>9</sup> The Court may however dispense with that rule, and entertain an application for the wife's costs subsequently to the hearing in a meritorious case.<sup>1</sup>

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<sup>5</sup> *Ellyatt v. Ellyatt & others*, 3 S. & T. 503.

<sup>6</sup> *Cooke v. Cooke & Allen*, 3 S. & T. 603; 34 L. J. 15.

<sup>7</sup> *Rolt v. Rolt*, 3 S. & T. 604; 34 L. J. P. & M. 51.

<sup>8</sup> *Keats v. Keats & Montezuma*, 1 S. & T. p. 358.

<sup>9</sup> When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

<sup>1</sup> See *Conradi v. Conradi & Flashman*, L. R. 1 P. & D. 163; 35 L. J. P. & M. 49; *Somerville v. Somerville & Webb*, 36 L. J. P. & M. 87.

## CHAPTER V.

*Of Suits for Decrees of Nullity of Marriage—Impotency or Malformation—Grounds of Nullity under the Marriage Acts : Banns ; Licence ; Due Notice to Registrar—Insanity—Consanguinity or Affinity—Prior Marriage—Defences in Suits of Nullity—Costs.*

A SUIT for a declaration of nullity of marriage—that is, for a decree that the marriage which is the subject of the suit, though solemnized in fact, was null and void in law—may be brought : first, on the ground of incurable impotency or malformation of the parts of generation of either party ; secondly, by reason of the marriage having been had without due publication of banns, or licence ; thirdly, on the ground of either party having been incapable of entering into the marriage contract by reason of insanity at the time of marriage ; fourthly, by reason of the married persons being within the prohibited degrees of consanguinity or affinity ; and fifthly, on the ground that either party was at the time of marriage legally married to another.

There is this clear distinction between the first named and the other grounds for annulling a marriage—that impotency or malformation does not of itself invalidate a marriage legally contracted—it is not void *ab initio* by reason of sexual incapacity, but only voidable, that is, liable to be impugned on proof of such incapacity during the lifetime of both parties.<sup>1</sup> The reason of this is

The five grounds of suits.

Distinction between the first and other grounds.

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<sup>1</sup> A. v. B. L. R. 1 P. & D. 559 : s. c. as P. v. S. 37 L. J. P. & M. 80.

expressed in the maxim: *consensus non concubitus facit matrimonium*: it is the consent to enter into a binding contract, and not the matrimonial copulation, which constitutes the marriage. To put this as plainly as possible: suppose a woman on her wedding night were to discover that her husband was an eunuch, she would not be justified in leaving him and marrying another man; for by doing so, she would incur the penalties of bigamy.

On the other hand, in the four latter grounds of nullity, the marriages so solemnized are mere ceremonies, and are by the legal or statutable disabilities to contract them, absolutely null and void to all intents and purposes.

#### IMPOTENCY OR MALFORMATION.

General  
requisites.

Capacity to perform the duties of marriage is so far essential to its validity, that as incapacity for sexual intercourse is necessarily attended with serious mischiefs to the parties as it prevents their fulfilling the principal purposes of marriage—the procreation of children and the lawful enjoyment of each other's person—impotency or malformation in either party is a good ground for annulling the marriage.<sup>2</sup>

The cases have not been numerous, partly because, it may be presumed, real defects of this nature are not very common in men and much more uncommon in women,<sup>3</sup> and because, where they do exist, persons are either discreet enough to abstain from marriage entirely, or where a marriage has been contracted in ignorance of the

<sup>2</sup> The distinction between the suit by the man and by the woman being that though she may be so malformed as to be impenetrable, and therefore unfit for sexual intercourse, she cannot strictly be impotent, whereas the gist of the complaint against the man is that *non potest penem erigere, nec feminam penetrare et cognoscere*.

<sup>3</sup> Of the cases herein referred to, nineteen were suits by women; ten by men.

Some confusion is apt to arise in citing the cases by reason of different initial letters being used in different reports of the same cases. In those instances I have referred to both reports.

defect, many reasons may operate to prevent the parties from making a public disclosure. There is, however, obviously, more excuse for a woman marrying under such circumstances, as she is not supposed, until married, to have the means of knowing the existence in herself of any physical impediment to matrimony.<sup>4</sup>

The suit must be brought from sincere motives, without delay, and under circumstances in which the consequences may be supposed to inflict a real injury and disappointment on the party complaining.<sup>5</sup> When, therefore, a person is really aggrieved on account of these consequences, the law affords a remedy according to the circumstances of the case. In the case of the husband, he is at liberty to resort to the Court as soon as he discovers that his wife, from malformation, is incapable of sexual intercourse. In the case of the woman being the complainant, she has the same remedy in a similar case, but if the incapacity of the man be *propter frigiditatem*, the law may require, before her suit be commenced, a sufficient cohabitation to establish the fact, and hence the rule, presently to be explained, of three years' cohabitation.

In all cases, however, there are two distinct questions: first, whether the marriage has in fact been consummated; and, if not, then whether such non-consummation is due to the impotency or malformation of the party charged.<sup>6</sup>

<sup>4</sup> Although a man, therefore, cannot petition on the ground of his own impotency, on the principle that no man shall take advantage of his own wrong; a woman might sue on account of being herself unfit for sexual intercourse. See *Norton v. Seton*, 3 Phil. 147, and the opinion of Sir Wm. Wynne, p. 149, *in notis*.

<sup>5</sup> But what will constitute insincerity is not easy to define: it must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit; though what would constitute such a case cannot be defined beforehand. *Anonymous*, Deane, p. 300.

<sup>6</sup> For the ground of the Court's interference is, that there is a practical impossibility that the marriage can ever be consummated. *G. v. G.*, L. R. 2 P. & D. 287; 40 L. J. P. & M. 83.

The principal means of proof are: medical inspection of the parties, and medical testimony as to the conclusions to be drawn from such inspection. In practice, an order—formerly called a monition—is usually issued, directing the respondent to submit to personal medical inspection; and two or more medical men are appointed by agreement between the parties, subject to the approval of the Court,<sup>7</sup> to inspect, when necessary, the persons of the petitioner and the respondent, and make their report accordingly: but whether the inspectors are so appointed or not, the Court is not bound by their report only, and evidence explanatory of it may be given, and they as well as other medical men may be examined.

The parties to the suit are also competent witnesses; and their evidence often much facilitates the investigation of the truth of the case.

Requisites  
of the  
woman's  
suit.

First: of the woman's suit as the more usual. When the woman is the complainant, the requisites to sustain her suit are: that the man was at the time of the marriage, and is incurably impotent; and that she is *virgo intacta*, *apta viro*—in other words, that no consummation has taken place, and that she is fit for conjugal intercourse.<sup>8</sup> The well-known fact that, in the generality of such cases, the health of the woman cannot escape serious injury is also to be considered.

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<sup>7</sup> When, in a suit by the woman, the respondent does not appear to the citation, and there is therefore no defence, the inspectors of the petitioner's person are appointed by one of the registrars.

<sup>8</sup> The refusal of the man to undergo inspection, coupled with his admission of his incapacity, must be taken strongly against him. In *Pollard v. Wybourn*, 1 Hagg. 725, the man was forty-one and the woman seventeen years of age at the time of marriage, and they cohabited at intervals for about eleven years, when the man quitted the country. They had for some time ceased to occupy the same bed in consequence of her health having suffered. The certificate of two medical men that she was *virgo intacta et apta viro* coupled with his confessions to them of his incapacity, though he had not given in any answer and had refused to undergo examination, were held sufficient.

Non-consummation is evidence of impotency by reason that according to the ordinary course of nature consummation does take place when persons both competent cohabit together. When, therefore, after such cohabitation, a woman is proved to be a virgin capable of consummation, the absence of consummation must necessarily be attributed to the apparent or undiscoverable impotence of the man. With this view, a rule was adopted in the Ecclesiastical Courts requiring when there was no evidence of the man's apparent impotence, proof of virginity after three years' cohabitation.<sup>9</sup> The object of this rule was that sufficient time might be afforded for ascertaining the true condition of the person complained of—that is, that there should be a cohabitation of so long an endurance that if the man were potent and in health, no temporary impediment could have prevented consummation according to all the reasoning and experience of which the subject admits.<sup>1</sup>

Rule requiring three years' cohabitation.

It was not, however, considered an absolutely binding rule, and might under circumstances be dispensed with; as, when the marriage after a cohabitation of sufficient length to overcome any temporary impediments had clearly not been consummated, and when by the admissions or acts of the party charged, his refusal to submit

When dispensed with.

<sup>9</sup> The duration of three years means not the lapse of time only, but continued facility for consummation, which must differ in many cases, for it rarely happens that married persons sleep together constantly in the same bed for three years. The Court therefore does not merely look to the length of time that the marriage has subsisted, but to the actual cohabitation and consequent facility for consummation. *N. v. M.* 2 Roberts, p. 637: s. c. as *A. v. B.* 1 Eccl. & Adm. 12.

In *Welde v. Welde*, 2 Lee, 578, it appeared that though the parties had been married three years, the cohabitation had not been continuous, but they had been a great part of that time absent from one another, and the evidence of the medical inspectors did not prove that the man was absolutely and naturally incapable.

<sup>1</sup> Temporary impediment is understood to mean nervous feeling on the part of the man, or resistance from fear on the part of the woman. *N. v. M.* 2 Roberts. p. 636.



to inspection, or other independent circumstances, the Court was satisfied beyond a doubt of the incurable impotence alleged.<sup>3</sup>

In *U. v. F.*,<sup>3</sup> the marriage took place in July, 1849, at which time the woman was twenty-three and the man twenty-five years of age. They cohabited at various places till towards the end of May, 1852, when the man went to Paris, having directed his wife not to follow him, and from which place he wrote to her indirectly admitting his impotency. The citation and the monition in the suit were served upon him there, but he refused to submit to inspection. The medical evidence with respect to the woman was that "no sexual intercourse had ever been properly effected; and that there was no impediment to perfect sexual intercourse on her part." The decree of nullity was pronounced.

In *A. v. B.*<sup>4</sup> the man was about forty-five and the woman about thirty at the time of marriage, and after a cohabitation of two years and some months they separated. The report of the medical inspectors was to the effect "that there is apparent capacity, or rather no apparent

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<sup>2</sup> *Greenstreet v. Cumyns*, 2 Phill. 10, where the parties were married in July, 1807, and the suit was instituted in 1809. The man admitted both in his answer and to the medical inspectors, that he was incapable at the time of marriage and had continued so ever since.

In *Sparrow v. Harrison*, 3 Curt. 16; on appeal to the Privy Council, 4 Moo. P. C. C. 96, the man's confession of non-consummation, and his refusal to undergo inspection, were held sufficient proof, there being no reason to suspect collusion between the parties. But in *Scott v. Jones*, 2 N. of C. 36, where the cohabitation had continued little more than three weeks, and the medical evidence established that the woman was a virgin and apt, and that there was no apparent defect in the man, the suit was dismissed.

<sup>3</sup> 2 Roberts. 614.

<sup>4</sup> 1 Eccl. & Adm. 12: s. c. as *N. v. M.* 2 Roberts. 625. With respect to impotency *quoad hanc*, see the *Case of the Countess of Essex*, State Trials, vol. ii. pp. 785, 805.

It is obvious that impotency, *quoad hanc*, as it is termed, is equally a grievance and quite as prejudicial to the individual woman as if the man were impotent in respect to all women.

incapacity" in the man: "that from his failure to accomplish sexual intercourse during a long period of cohabitation, we believe the said *B.* to be impotent as regards the said *A.*, and that such impotency cannot be removed by art or skill." The Court pronounced for the nullity, holding that the general rule requiring three years' cohabitation is not absolutely necessary when there has been an actual cohabitation sufficiently long to overcome, were the man potent, any temporary impediment to consummation.

In *G. v. T.*<sup>5</sup> the parties separated after a cohabitation of only three months. The certificate of the inspectors as to the wife was to the effect that though there were no certain signs of virginity which could be relied on, yet there was no evidence of perfect connection having ever taken place. As to the husband:—"We find no anatomical malformation, but from oral information obtained during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent." At the hearing, no opposition was offered, and Dr. Lushington pronounced for the nullity, and observed that he could not think of sending the lady back to renew cohabitation, though he could have wished that it had been more distinctly stated that her health had suffered and was liable to suffer by such cohabitation.

Only three months' cohabitation.

Now, however, that the parties are admitted to tell their own tale, the rule that impotence is to be presumed after three years ineffectual cohabitation and not before, may according to their evidence, be more easily applied or dispensed with.

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<sup>5</sup> 1 Eccl. & Adm. 389.

In *M. v. H.*<sup>6</sup> it appeared from the medical certificate and the evidence of the petitioner, that she was a virgin and without defect; that the husband had no visible defect either,—on the contrary, had every outward sign of perfect health and vigour; and that the parties had cohabited two years and ten months, and during the greater part of that time had occupied the same bed: the wife stated that he had often attempted consummation, but without effect, and denied any unwillingness on her part. The husband's evidence was that he had desisted from enforcing his marital rights by reason of the marked repugnance of his wife; and that the non-consummation of the marriage was due only to consideration for her, and forbearance on his part.

Under these circumstances the Court suspended its decree, recommending that the petitioner should return to cohabitation for a time; and subsequently, on affidavits that she had done so, and that after sleeping with her husband for about a month, the marriage had remained unconsummated, pronounced a decree of nullity—the husband not further opposing.<sup>7</sup>

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<sup>6</sup> 3 S. & T. 517, 592.

<sup>7</sup> In *S. v. E.* 3 S. & T. 240: s. c. as *Stagg v. Edgcombe*, 32 L. J., P. & M. 153, the cohabitation had continued little more than two months, and the report of the medical inspectors disproved impotency from disease or natural infirmity; but ascribed the non-consummation of the marriage to temporary incapacity occasioned by a long-continued habit of excessive self-abuse—masturbation\*—which as they explained in their *vidē voce* evidence might possibly, but not probably, be cured by moral self-restraint. No formal report was made as to the state of the petitioner, but she deposed that the respondent had twice attempted without success to consummate the marriage, and the evidence of the medical men who had examined her was equivocal as to her condition. The Court held that it had no right to assume that the incapacity would be permanent, and dismissed the petition.

This is, happily, the only reported case of the kind.

\* Masturbo=μαστροπυτω. It has also been termed Onanism See Genesis xxxviii. 9.

In *F. v. D.*<sup>8</sup> the husband had been personally served with the petition and with the order of the Court to submit to medical inspection, but he neither appeared nor obeyed the order. The report of the medical inspectors as to the condition of the petitioner was "that there is no malformation nor impediment on her part to prevent the act of generation, but we cannot determine whether she is a virgin."

The evidence of the petitioner, by leave of the Court given on affidavit, detailed her cohabitation with the respondent, and his constantly repeated but ineffectual attempts to consummate the marriage during a period of about seventeen months, at the end of which time, broken in health, she left him and returned to her father. The Judge Ordinary held the non-consummation and the impotence proved; and with respect to the rule of three years' cohabitation, observed: "this rule only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved *aliunde*, the Court has never resorted to it. The present case falls rather within the latter class; for if I may rely on the petitioner's oath, the impotence is beyond a doubt; and if I cannot rely upon her oath, I shall have no better ground for doing so, by putting her to repeat the same story at the end of another eighteen months' cohabitation."

The evidence ought to be unequivocal as to the condition of the woman and the incurable impotence of the man. The Court is very reluctant to act upon the unsupported statements of the petitioner; and will only do so when there is not the least reason to doubt the truth and *bonâ fides* of the case. If there is a direct conflict of testimony between the two parties who alone know the truth, the difficulty of deciding between them is much increased.

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<sup>8</sup> 4 S. & T. 86; s. c. as *D. v. F.* 34 L. J. P. & M. 66.

In *T. v. D.*<sup>9</sup> the petitioner was about thirty, and the respondent about thirty-five years of age at the time of their marriage in 1854. They cohabited without any complaint on the part of the petitioner till 1863, when they separated on account of the respondent's ill-treatment of her. The medical inspectors certified as to the petitioner that "the usual sign of virginity, the presence of a hymen, is absent, and we do not find anything that would be an impediment to the due performance of sexual intercourse;" and as to the respondent, that in their opinion he was quite capable of performing the act of generation. At the hearing other medical men were examined in support of the petition, but they neither corroborated nor contradicted the statement of the petitioner that the marriage had never been consummated. The respondent had denied his impotence, but did not appear at the hearing.

The Judge Ordinary, in dismissing the petition, said: "Eight years' cohabitation without complaint, and at the end of it a separation enforced by the husband, justify a vigilant suspicion as to the sincerity of the suit. The strong motive that exists on both sides to break a tie that had become burthensome to both, makes it difficult to obtain a true account from either. The husband stands by. It is said he is hostile; but he is hostile to his wife, not to the suit, and the wife's personal account is the sole testimony which the Court has for its guidance. It derives no support from any single circumstance in the case, nor from the physical appearances to which the medical witnesses speak. The result is that the charge is not made out to the satisfaction of the Court."

Again, in *U. v. J.*<sup>1</sup> the petitioner during two years and some months cohabitation made no complaint, and the

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<sup>9</sup> L. R. 1 P. & D. 127; s. c. as *Tavernor v. Ditchfield*, 35 L. J. P. & M., 51.

<sup>1</sup> L. R. 1 P. & D. 460; 37 L. J. P. & M. 7.

separation appeared to have been caused by the violence of the respondent. The only evidence of the alleged impotence was that of the petitioner, which was contradicted by the respondent. The medical evidence respecting the petitioner was that no opinion could be formed "whether for two years she had had ordinary and regular connection with her husband or not," and that "it might have been the case" consistently with what was seen. The Court dismissed the petition.

Lapse of time between the marriage and the institution of the suit is not in itself a bar, for it may be explained or accounted for; but as it tends to throw obscurity over the circumstances of the case, and to render doubtful that evidence upon which, if brought forward at an earlier period, full reliance might have been placed; it follows that after great lapse of time the clearest and most unequivocal evidence of the facts will be required.

The complainant therefore, whether man or woman—for the same principle, with some modification is to be applied to both—should proceed without marked delay, for if the alleged grievance is borne with for a long time, the presumption is that the petitioner is seeking relief not under the real pressure of the grievance on which the suit is founded, but for some side purpose.

Lapse of time coupled with an indirect motive may be considered an absolute bar.

In *H. v. C.*,<sup>2</sup> the first case in which delay on the part of a woman was considered, the parties were married in 1834. On the morning after the marriage, the man exclaimed on entering the breakfast room, "My poor virgin wife!"

About ten months afterwards the wife reproached her husband with his want of confidence in not telling her that he was unable to consummate the marriage. He said he was not able to perform the part of a husband, and

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<sup>2</sup> 1 S. & T. 605; 29 L. J. P. & M. 81: on appeal to the House of Lords 31 L. J. P. & M. 103.

subsequently consulted a medical man, as did also the wife. They continued to live amicably together till 1838, but without any change in the husband's condition. Her father and mother then spoke to him on the subject, upon which he left the house and refused to live with her again. From that time till 1854, she maintained herself by her own exertions, but frequently importuned her husband to take her back to live with him. In that year, however, she being ill, was unable to maintain herself, and caused him to be sued as her husband for debts incurred by her; the result of these proceedings was that he made her an allowance which was continued till 1858, when he wrote to her, saying that it must be reduced, and she soon after filed her petition for nullity. The only evidence as to her condition, beyond her own testimony, was that of a medical man, who had attended her some ten years before for a uterine disorder, and who certified that from the examination he then made he inferred that the marriage had not been consummated; and that there was no imperfection on her part which would render consummation impossible. The cause was heard before the full Court, and Sir C. Cresswell, in giving the judgment of himself and Williams, J., said:—"Considering the length of time that has elapsed since the marriage and since the separation, the knowledge which the petitioner then had of her husband's imperfection, her request repeated continually for sixteen years afterwards to be received back by him, her arrangements with creditors to sue him as her husband for debts contracted by her,<sup>3</sup> her negotiation for, and the receipt of an allowance for several years, and the institution of this

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<sup>3</sup> Bramwell, B., who dissented from the judgment generally, observed upon this part of the case: "Nor do I think it of any moment that she allowed him to be sued for debts contracted by her. It is said to be an admission by her; that is assuming her to have a considerable knowledge of the common law and the law ecclesiastical; but I doubt if it is anything but an admission of the truth—viz. that he was her husband *de facto*."

suit on an intimation that the allowance would be reduced; considering also the imperfect nature of the medical evidence adduced, and that much more precise and certain testimony might have been had if the suit had been commenced within a reasonable period, I am of opinion that the petitioner is not entitled to a decree.”<sup>4</sup>

Again, in *M. v. B.*<sup>5</sup> the petitioner was married to the respondent in 1853, and slept with him for about two years, when at his request she occupied a separate bed, but continued to live in his house until 1863, when she left him in consequence of a dispute about a servant-boy whom he insisted upon having constantly with him in the drawing-room in the evenings. According to her evidence, the respondent had made only one unsuccessful attempt to consummate the marriage on the wedding night, and the certificate of the medical inspectors showed that she was a virgin, and fit for intercourse. The respondent did not appear nor submit himself for medical inspection. It further appeared that the suit was not thought of for some months after she had left her husband, and was then instituted by reason of reports which were circulated that she was obliged to leave her home because she was mad. Under these circumstances, the Court dismissed her petition.

In *L. v. H.*<sup>6</sup> the parties cohabited from the date of their marriage in November, 1848—the man being then about thirty and the woman about twenty-two years of age—till July, 1862: the woman then occupied a separate bed for a few weeks in consequence of disputes about other matters, and, in August, finally left the house. In 1864 she petitioned for a decree of nullity. The report of the medical inspectors was in effect that the woman

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<sup>4</sup> Affirmed on appeal to the House of Lords, as *Castleden v. Castleden*, 9 H. of L. cas. 186.

<sup>5</sup> 3 S. & T. 550.

<sup>6</sup> 4 S. & T. 115; s. c. as *X. v. Y.* 34 L. J. P. & M. 81.



was a virgin, and that there was no impediment on her part to prevent consummation; and that there was no malformation in the man, nor any appearance indicating a want of capacity. At the hearing the testimony of the parties with respect to consummation was directly contradictory. Evidence was also given by the inspectors and by other medical men. In the result the Court came to the conclusion that the marriage had never been completely consummated; but that it was not proved that there was any impotency on the part of the man; that the separation had not been due to any distress felt by the petitioner on account of her husband's supposed defects; that in that case her delay would have been a bar: and dismissed him from the suit.

On appeal,<sup>7</sup> the House of Lords reversed this decision, and pronounced the marriage null and void;<sup>8</sup> and with respect to the objection on the ground of delay, Lord Chelmsford in his judgment said: "It seems at first sight extraordinary that any length of time should operate as a bar to a proceeding for the nullity of a marriage. The usual maxim of law is *quod ab initio non valet, in tractu temporis non convalescit*, but it seems that in cases of this description, delay in instituting the suit, not satisfactorily explained, is taken as a personal exception to the petition."<sup>9</sup>

Unexplained delay, however, combined with an indirect motive for the suit, is still treated as a bar.

In *M.* falsely called *O. v. O.*<sup>1</sup> the marriage took place

<sup>7</sup> This case, like many others of the same kind, can be properly estimated only by reading and comparing the evidence and the two judgments in full.

<sup>8</sup> *Lewis v. Hayward*, 35 L. J. H. of L. 105.

<sup>9</sup> Again in *Cuno v. Cuno*, L. R. 2 Sc. & Div. App. 300, Lord Chelmsford said: "Delay in a suit for nullity of marriage on the ground of impotence can be no bar, even if the proceedings have emanated from some unworthy motive, provided the case is clearly proved on the part of the person complaining."

<sup>1</sup> L. R. 2 P. & D. 414; 41 L. J. P. & M. 37; affirmed on appeal to House of Lords as *Cuno v. Cuno*, L. R. 2 Sc. and Div. App. 300; 42 L. J. P. & M. 65.

in 1863, and cohabitation continued till 1870, when a deed of separation was executed; and in 1871, the wife instituted a suit for nullity on the ground of her husband's impotency. She failed to establish the charge, and her suit was dismissed; the Court, in giving judgment, observed that "a petitioner, made cognizant within four or five years after her marriage, of her husband's impotency, could not delay proceedings for three years more without being open to the charge of a want of sincerity or promptitude."

In *W.* falsely called *R. v. R.*,<sup>2</sup> the parties were married in 1849, and the suit was not instituted till 1875. The medical evidence showed that the petitioner was *virgo intacta*, and that the respondent was incurably impotent. No satisfactory explanation was given of the delay; and as it appeared from the evidence of the petitioner that the suit was brought partly in consequence of quarrels and disagreements between herself and her husband, and not for the single object of redress on account of his impotency, the Court dismissed the husband from the suit.

Where the husband is the complainant on the ground of his wife's unfitness, the rule requiring three years' cohabitation does not apply, and it is only necessary to establish by medical testimony the incurable malformation of her person. Delay, therefore, on his part, in instituting the suit—especially if coupled with other facts showing insincerity—will, if unexplained, be the more strongly pressed against him, for he ought, in justice to the woman, immediately on discovering her unfitness for sexual intercourse, to proceed to ascertain whether the defect is curable or not, and act accordingly.<sup>3</sup>

The man's  
suit.

<sup>2</sup> L. R. 1 Prob. Div. 405; s. c. reported as *Reynolds* otherwise *Wilkins v. Reynolds*, 45 L. J. P. D. & A. 89.

<sup>3</sup> When, however, the delay can be satisfactorily accounted for; as in *E. v. T.* 3 S. & T. 312, where the man abstained for ten years from instituting his suit by reason of the woman's nervous and delicate condition; it ceases to be a bar.

In *Guest v. Guest*<sup>4</sup>—though the suit was dismissed mainly on other grounds, it appearing that there were pecuniary motives for instituting it—Lord Stowell observed: “The length of time which has elapsed is, in itself, almost a bar. . . . That a period of seven years should be allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.” And in *Briggs v. Morgan*,<sup>5</sup> a delay of sixteen months was considered to be “not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in a case of actual malformation no such proof is required.”

Dr. Lushington’s observations by *B. v. B.*<sup>6</sup> are very strong on this point: “As relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus*. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, ‘Give me a remedy for a grievance I have not felt,’ and that to the detriment of another.”

In this case, the effect of the medical evidence was that there existed a malformation which was incurable, and that it was impossible that the woman could become a mother, but that sexual intercourse, limited in some particulars, was not only practicable but had actually

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<sup>4</sup> 2 Consist. p. 323.

<sup>5</sup> 2 Consist, p. 330.

<sup>6</sup> 1 Eccl. and Adm. p. 260; 2 Roberts 580.

taken place; and two of the medical witnesses deposed that she was not a virgin. In this state of things the Court, looking at all the circumstances of the case—the great lapse of time, about eighteen years, between the marriage and the institution of the suit, and the fact that it appeared to be instituted from other motives, incompatibility of temper—came to the conclusion that the petitioner was not entitled to a decree.

To sustain the man's suit, the woman must be *viro inutilis*, and though barrenness—the mere incapability of conception—is not sufficient ground whereon to found a decree of nullity; yet if she be so incurably malformed as to be unfit for *proper* sexual intercourse, the man is entitled to a decree, for if the intercourse be so imperfect as to be scarcely natural, it is, legally speaking, no intercourse at all, inasmuch as it fails to attain one of the principal ends of matrimony—the protection against illicit intercourse by the lawful indulgence of the passions.

In the singular case of *D. v. A.*<sup>7</sup> the parties were, when married, of the respective ages of twenty-six and twenty-five years, and cohabited for nearly two years before the commencement of the suit. The medical evidence showed that the woman was so malformed as to be irremediably incapable of procreation or conception, though there might be connection of a very imperfect character, owing to the peculiar and unnatural formation of the vagina; it being an impervious *cul de sac*, incapable of elongation, and admitting only a very partial insertion of the penis. The marriage was annulled.

The ages of the parties at the time of marriage are also to be considered, for although there is no legal limit to the age at which a right to complain ceases, and few men may be found willing to agree with the *dictum* of

The  
requisites  
to sustain  
the suit.

The ages  
of the  
parties to  
be con-  
sidered.

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<sup>7</sup> 1 Roberts, 279.

Sir J. Nicholl, that a man of sixty who marries a woman of fifty-two should be content to take her *tanquam soror*,<sup>8</sup> yet a man who marries a woman of advanced age ought to take the consequences with her.<sup>9</sup> In *Briggs v. Morgan*, already referred to, the man was forty-two years of age at the time of marriage, the woman being then fifty and a widow.<sup>1</sup> Lord Stowell took into consideration the respective ages of the parties, and held that he was not justified in exposing a woman of that age to the only proof by which the alleged defect could be satisfactorily established. For this reason, and from circumstances showing delay and insincerity on the part of the complainant, the woman was dismissed from the suit.

In *W. v. H.*<sup>2</sup> the parties were of the respective ages of fifty-four and forty-nine, and the result of the medical evidence was that the obstruction was congenital, and that it might possibly be removed by a surgical operation; that such an operation would, the woman being forty-nine years of age, be attended with considerable danger to her life, and the success of it, with regard to the result to be obtained, doubtful. The Court held that, under these circumstances, the petitioner could not be expected to call upon the respondent to undergo an operation; that the malformation was to be considered

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<sup>8</sup> In *Brown v. Brown*, 1 Hagg. 523, the wife's suit on the grounds of cruelty and adultery, in answer to which the man alleged her malformation, which was not, however, proved to be incurable.

<sup>9</sup> Although it is obvious that different considerations must apply to persons of advanced age and to those of an earlier period of life; no limit has been assigned, either legally or medically, to the *possibility* of sexual intercourse. See Taylor's Med. Jurisp. Chapters 66, 67, edit. 1865.

<sup>1</sup> An objection having been taken, that the woman had long been the wife of another man, Lord Stowell observed: "It cannot be contended to be an estoppel of one man's complaint that another did not complain who might have had the same cause of complaint, but which for private reasons affecting his own discretion he did not think proper to bring forward."  
2 Consist. p. 327.

<sup>2</sup> 2 S. & T. 240

as congenital and permanent, and pronounced a decree of nullity.

In *G. v. G.*<sup>3</sup> the parties had been married and had cohabited for about two years and ten months, and the woman refused to allow her husband, who was perfectly competent, to consummate the marriage. The medical evidence was that, though there was no malformation or structural defect in her, she was suffering from excessive sensibility; and that there were means by which her condition might be remedied, but in order that they should succeed, it was necessary that she should lend herself to them; but that if she refused to do so, the marriage could never be consummated. The Court, being satisfied that consummation was practically impossible, annulled the marriage.

In *H. v. P.* falsely called *H.*<sup>4</sup> it appeared from the evidence of the petitioner that whenever he had attempted to have intercourse with his wife, the act brought on hysteria on her part, so that, although he had cohabited with her for more than three years, the marriage had never been consummated. The wife refused to submit to inspection. The Court made a decree *nisi*.<sup>5</sup>

There is this distinction between the suit by the woman and by the man; that whereas the man's confession of impotency and refusal to undergo inspection are strong evidence against him, the malformation of the woman must be proved, and much difficulty may be caused by her evading or refusing to undergo medical inspection.

In *T. v. M.*<sup>6</sup> the respondent had not been personally served with the petition and citation—substituted service

<sup>3</sup> L. R. 2 P. & D. 287; 40 L. J. P. & M. 83.

<sup>4</sup> L. R. 3 P. & D. 126.

<sup>5</sup> Decrees in suits for nullity of marriage being now, by the 36th Vict. c. 31, in the first instance, decrees *nisi*.

<sup>6</sup> L. R. 1 P. & D. 31; 35 L. J. P. & M. 10.

having been allowed by order of the Court on her brother—and had never submitted to a medical examination, and could not be found, but was supposed to be abroad. At the hearing, the evidence of the petitioner, and of the medical men who had attended the respondent but had never examined her person, did not satisfy the Court that she was the subject of incurable malformation. The Court suspended Its decree in order to give the petitioner an opportunity of having her examined, if she should come within the jurisdiction.<sup>7</sup>

MARRIAGE WITHOUT DUE PUBLICATION OF BANNS OR  
LICENCE.<sup>8</sup>

By the 22nd section of 4 Geo. IV, c. 76, it is enacted that if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns, or licence from a person or persons having authority to grant the same,

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<sup>7</sup> In *B. v. L. L. R.* 1 P. & D. 639; 38 L. J. P. & M. 35, the Court made the usual order for the medical inspection of the respondent's person; and that the respondent and the inspectors should attend before one of the registrars of the Court at such time and place as he might appoint in order that the respondent might be identified as the party in the cause, and the inspectors be duly sworn. This order was duly served upon her, but she refused to submit to any such inspection. On motion for an attachment against her, the Court directed that it should stand over until the hearing, intimating that if she attempted to leave the jurisdiction it should be granted at once.

<sup>8</sup> Under Lord Hardwicke's Act, 26 Geo. II, c. 33, s. 8, a marriage was void when had "without publication of banns," and it was constantly held that a publication in false names was no publication; but in that Act there was no provision for the protection of innocent parties, and in many cases the Courts were obliged to annul the marriage where one of the parties had been guilty of fraud, without its being possible to do justice to the other party not cognizant of the fraud, and it was to remedy this inconvenience that the the section of the present Marriage Act, as set out in the text, was passed.

first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in Holy Orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.<sup>9</sup>

This provision must be considered under two heads: banns and licences.

First, with respect to banns: there must have been **Banns.** such an error in the description of one or both of the parties either by suppressing or adding a Christian name or altering a surname as would mislead those interested in the marriage; for if the publication is such as not to designate but to conceal the parties, it is no publication. But it must be shown that both parties were cognizant of and participated in the fraud; the act of one will not operate to the prejudice of the other.

Suits of this description have usually been instituted by **By whom** a parent to annul the clandestine marriage of a minor; **instituted.** but the minor may petition through his father as guardian; or, the suit may be brought by either of the parties, when of age.<sup>1</sup>

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<sup>9</sup> Inasmuch as the marriage contract differs from all other contracts in this: that it alters the personal status of the parties; the Courts, both Common Law and Ecclesiastical, have always regarded with jealous suspicion suits founded on the mere informality of the ceremony.

For some decisions under the first marriage Act, see *Res v. The Inhabitants of Billingshurst*, 3 M. & S. 250, and the cases in the note thereto; *Res v. The Inhabitants of Tibshelf*, 1 B. & Ad. 190, and Lord Tenterden's judgment, p. 195; and under the present Act, *Res. v. The Inhabitants of Wroton*, 4 B. & Ad. 640.

<sup>1</sup> In *Sherwood v. Ray*, 1 Moo. P. C. C. 353, the possibility of the father becoming liable to maintain his grandchildren under 43 Eliz. c. 2, s. 7,\* in the event of the death or inability of the parents, was held to give him a sufficient pecuniary interest in his daughter's marriage to entitle him to maintain a suit to inquire into its validity; but in *Bevan v. M'Mahon & Bevan*, 2 S. & T. 58, the father having died after having instituted a suit for the nullity of his daughter's marriage, the Court held that it had

\* In the revised edition of the statutes, S. VI, Vol. I. p. 672.



The case is to be established by the production of the marriage registers; the testimony of the parties, and of other witnesses; and by evidence of circumstances showing fraudulent intention.

**Cases.**

The classes of misdescription will be best explained by the following train of cases in which decrees of nullity were pronounced.

**Suppression of Christian name.**

In *Pouget v. Tomkins*,<sup>2</sup> the Christian names of the husband, who was a minor, were William Peter, but it was proved by the testimony of his family that the first name had been superseded in common use, and that he had been constantly called and known by the name of Peter only. The banns were published in the name of William Pouget for the purpose of concealing his identity from his father who was entirely ignorant of the transaction, and by whom the suit was brought.

In *Wiltshire v. Wiltshire*,<sup>3</sup> the man's Christian names being Henry John the banns were published in the name of John only at the instigation of the woman in order to conceal the marriage from his father.

In *Tongue v. Tongue*,<sup>4</sup> Edward Croxall Tongue, a

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no power to allow the widow to carry on the suit, as, at the time it was commenced, she had no interest in it, and could not then have instituted it; she was not at that time liable under the Act to be called upon to maintain her grandchildren, if any, as the statute confers no power of charging the grandfather and grandmother jointly with their maintenance.

In *Wells v. Cottam*, 3 S. & T. 364, it was held that the father of a minor petitioning for a decree of nullity of his child's marriage, must cite both the parties.

<sup>2</sup> 2 Consist. 142; 1 Phill. 499. In *Stanhope v. Baldwin*, 1 Add. 93, Augustus Henry Edward Stanhope was married by the names of Edward Stanhope only, and in order to conceal the marriage more effectually, he assumed on the occasion the dress of a groom or labouring man, the lady that of a maid servant. The marriage was in 1813, and the suit was instituted in 1822.

<sup>3</sup> 3 Hagg. 332. In this case, the first under 4 G. IV. c. 76, the suit was instituted by the father, but was continued by the petitioner himself, on his coming of age.

<sup>4</sup> 1 Moo. P. C. C. 90. See this case in the Court below, as *Tongue v. Allen*, 1 Curt. 38.

minor, was married to a widow aged thirty-five, and the banns were published in the names of Edward Tongue, by which he signed his name in the register—he having been always called by the name of Croxall only, the name of Edward having become entirely dormant and disused—and Mary Ann Allen, spinster. The marriage was without the knowledge of Tongue, the father, who, on discovering it, instituted the suit. It was held that the circumstance of the man having signed his name in the register showed that he must have known that the banns had been published in that name only, and that his doing so was a fraud.<sup>5</sup>

In *Brealy v. Reed*,<sup>6</sup> a suit promoted by the woman, it was proved that both parties had concurred—with the view of concealing the marriage from the father of the man—in suppressing the name of Charles, the name by which he was always called, his Christian names being Robert Charles, and the banns were published in the name of Robert only.

In *Orme v. Holloway*,<sup>7</sup> a suit instituted by the father of the husband, a minor, it was proved that the banns were published in the names of William Orme only, his other baptismal name, Wheeley, being omitted; that the woman, a servant in the father's house, was also wrongly described as Harriet Spittle, she having been always known as Harriet Holloway; and that the parties had acted in concert for the purpose of concealing the marriage.

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<sup>5</sup> But in *Wright v. Elwood*, 1 Curt. 49, 662, where the man caused the banns to be published between himself and Emma Elwood, spinster, she being at the time properly Amelia Elwood, and a married woman, though her husband died before the celebration of the marriage in question, it was held valid, as, at the period of publication, Wright supposed Mrs. Elwood was a spinster, and therefore it could not be said that this was a false publication with the consent and connivance of both parties.

See also, *Mayhew v. Mayhew*, 2 Phill. 11; *Hadley v. Reynolds*, referred to in *Tongue v. Allen*, 1 Curt. p. 47.

<sup>6</sup> 2 Curt. 833.

<sup>7</sup> 5 N. of C. 267.

Addition  
of Name.

The insertion of an additional Christian name or the substitution of such a name may be as fraudulent as the omission of one.<sup>8</sup> In *Midgeley v. Wood*,<sup>9</sup> a decree of nullity was pronounced on the woman's petition, she having agreed with the man that in order to conceal the marriage from his grandfather, upon whom he was dependent, the banns should be published in the names of John Wood, his only baptismal name being Bower.

Alteration  
of  
Surname.

The alteration or substitution of a surname may suffice: as in *Farquharson v. Farquharson*,<sup>1</sup> where the man had paid his courtship to two girls, named respectively Elizabeth Stayte and Mary Hides, and in order to conceal their marriage, persuaded Elizabeth Stayte to marry him by the names of Mary Hides.

Surname  
of illegiti-  
mate child.

In several cases, the question has been raised as to what is the proper name of an illegitimate child; of which the results may be thus stated: that the name published should be that by which the person is generally known, but that as a name acquired by reputation may be superseded by another name of habit and reputation, there may be cases where the publication of the real name would defeat the object of the statute.<sup>2</sup>

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<sup>8</sup> For some cases under the first Marriage Act, see *Fellowes v. Stewart*, 2 Phill. 238, 257, where the banns were published in the name of the man as William Douglas Dundas Stewart, then under his direction as William Dundas, his only baptismal name being William. See also *Tree v. Quin*, 2 Phill. 14; *Dobbyn v. Corneck*, 2 Phill. 102; *Green v. Dalton*, 1 Add. 289.

<sup>9</sup> 4 S. & T. 267; 30 L. J. P. & M. 57.

<sup>1</sup> 3 Add. 282.

So in *Meddowcroft v. Gregory*, 2 Phill. 365, a suit by the father to annul the marriage of his son, a minor, the banns having been published in the name of William Widowcroft, was sustained. But in *Diddear v. Faucit*, 3 Phill. 580, where the man was married by the name of Faucit, whereas his real name was stated to be Savill—he was an actor, and passed by the name of Faucit—and there was nothing to show that there was any intention of imposing a false name for the purpose of deceiving any one, the suit was dismissed.

<sup>2</sup> *Wakefield v. Wakefield*, 1 Consist. 394; 1 Phill. 134, where the woman in the course of her life had used a variety of surnames, but the Court held

In *Tooth v. Barrow*,<sup>3</sup> the petitioner, Charles Tooth, married a woman named Elizabeth Barrow, who was the illegitimate daughter of a person named Sarah Tooth—not related to the petitioner—and who, when her daughter was about four years old, married a man named Barrow. Elizabeth had constantly lived with them after their marriage, and was always called and known by the name of Barrow. In the banns, she was described by the names of Elizabeth Tooth, and not as being the daughter of her mother Sarah Barrow, but of her mother's brother, who, at the marriage, also represented himself as her father. It was held that the parties had knowingly and wilfully intermarried without due publication of banns.

But the mere passing by another name will not supersede a name properly acquired.

Name  
acquired  
by mar-  
riage.

In *Fendall otherwise Goldsmid v. Goldsmid*,<sup>4</sup> the woman having obtained a decree of dissolution of marriage, was again married to the respondent. The second marriage was celebrated after publication of banns, in which the petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. A petition having been filed by her for a decree of nullity

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that, the banns having been published in the name of her mother, they had been published in her proper name. See Lord Stowell's observations in this case on the inconvenience of successively adopting a variety of surnames. See also *Wilson v. Brockley*, 1 Phill. 132.

In *Sullivan v. Sullivan*, 3 Phill. 45, the publication of the banns of an illegitimate child by the surname of her mother as well as by that of her father,\* she having been born before the marriage of her parents, was held valid, there being nothing to show that fraud was intended by using the additional name, but, on the contrary, *ex abundanti cautela*.

<sup>3</sup> 1 Eccl. & Adm. 371.

<sup>4</sup> L. R. 2 Prob. Div. 263; 46 L. J. P. D. & A. 70.

\* It is not an uncommon, though an erroneous opinion, that the name of the mother is the only true name for an illegitimate child.

by reason of undue publication of banns, the Court expressed its opinion that a name acquired by marriage can only be superseded by a reputed name in cases where the name has been so far acquired by repute as to obliterate the name acquired by marriage. The petition, which ought never to have been instituted, was withdrawn.

Distinction between marriages by banns and licence.

• A distinction has been established between a marriage by banns and a marriage by licence with respect to suits of nullity: that the publication of banns being a notice to all the world that the parties intend to contract a marriage, it is essentially necessary that the publication should be in the true names; whereas a licence being a dispensation from the necessity of publication of banns, is not of the same notoriety, but is granted by the Ordinary on the evidence which he is content to receive—the oath of the party as required by the canons of the Church<sup>5</sup>.

To annul a marriage solemnized by licence therefore; it is not sufficient that there was an alteration of the name; there must have been an error respecting the person: there must have been not merely the assumption of a false name; but both parties must have knowingly and willingly acquiesced in the fraudulent substitution of one person for another.<sup>6</sup>

<sup>5</sup> See Canons C to CIV: Cardwell, Synodalia, vol. 1, pp. 222, 304.

<sup>6</sup> *Cope v. Burt*, 1 Consist. 434, where the real name and description of the woman was Sarah Burt, spinster, and in the licence she was described under her assumed names of Elizabeth Melville, widow; but as the husband did not suppose that he was marrying Sarah Burt when he married Elizabeth Melville, the marriage was held valid. "If," said Lord Stowell, "it should appear that a licence procured for one person was transferred to another, it might be a fraud which the Court would be bound to notice."

In *Clowes v. Clowes*, 3 Curt. 185, the parties had been cohabiting for some time before the marriage, and the woman had passed by various names: the licence was obtained by the man in the names which she represented as her real and true names, but which were not so. On his petition for a decree of nullity, it was held that as both parties were able

There is no reported case of a marriage by licence having been declared null and void.

#### DUE NOTICE OF MARRIAGE BEFORE REGISTRAR.

With respect to a suit for nullity of marriage under the Acts authorizing marriages before a Registrar,<sup>7</sup> it will be sufficient to refer to the case of *Holmes v. Simmons*,<sup>8</sup> where it was held that the "due notice" required for the

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and willing and meant to contract the marriage in question, there was nothing to vitiate the licence.

See also *Bevan v. M'Mahon*, 2 S. & T. 230, where the woman petitioned for a decree of nullity on the grounds that the man had, by her direction, and for the purpose of concealing the marriage from the surrogate and from her family, suppressed one of her Christian names, and falsely described her residence, and also his residence and occupation: the Court upheld the marriage, and confirmed the distinction between banns and licences above laid down.

With respect to the construction to be put on the words "licence from a person not having authority to grant the same," see *Dormer v. Williams*, 1 Curt. 870, the woman's suit by reason of the licence having been obtained by the man for the marriage to be performed at the place therein named, whereas the marriage was in fact performed at another place; and it was held that as there was nothing to show that both parties had a guilty knowledge that the law was violated, the marriage could not be declared null.

As to marriage "without licence," see *Greaves v. Greaves*, L. R. 2 P. & D. 423; 41 L. J. P. & M. 66, where the husband had applied for a licence on the 17th of June, was married on the 18th of June, and the licence was not issued until the 19th of June. At the time when the ceremony was performed, the man was aware that the licence was not in existence, but the woman was not. The marriage was held to be valid, as the parties had not wilfully intermarried without licence.

<sup>7</sup> See 6 & 7 Wm. IV, c. 85, ss. 42, 43; 1 Vict. c. 22; 19 & 20 Vict. c. 119, ss. 17, 19.

<sup>8</sup> L. R. 1 P. and D. 523; 37 L. J. P. & M. 58.

Although it may still be a question what would be the effect of a notice given in entirely false names, the result of the above decision and the construction there put upon the registration Acts is that it would be very difficult to invalidate a marriage merely on the ground of non-compliance with the prescribed formalities.

There are, in fact, no provisions in the Statute for annulling a marriage by reason that the requirements of the Act have not been strictly complied with. See *Prowse v. Spurway & Bowley* otherwise *Spurway*, 46 L. J. P. D. & A. 49.

validity of a marriage before a Registrar, is a notice conforming to the formalities provided by 6 & 7 Wm. IV, c. 85, and that the words "due notice" will be satisfied though the contents of the notice in respect of Christian name or residence or other details are not strictly true or accurate.

#### INSANITY.

The next ground to be considered for annulling a marriage is the want of reason in either party at the time of entering into the contract, for as the very essence of the contract is consent; without soundness of mind there can be no consent binding in law; and if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives.<sup>9</sup>

It is not necessary that there should have been absolute idiocy or constant insanity; for those conditions would carry with them their own security and protection; and in either case, the forms preceding the ceremony and the ceremony itself could not be gone through without exposure and detection. But there must have been such a degree of mental imbecility that the person was incapable of understanding the nature of the contract sufficiently to be bound by it. Suits of nullity have therefore been sustained where the marriages have been brought about by means of fraud and circumvention practised upon persons of very weak mind, though not actually insane.<sup>1</sup>

Evidence.

It is not sufficient that the person has been found lunatic by commission: the Court must be satisfied by

<sup>9</sup> *Turner v. Meyers*, 1 Consist. 414, where a suit by a man himself, after his recovery, on the ground of his past incapacity was sustained. *Hancock v. Peaty*, L. R. 1 P. & D. 335; 36 L. J. P. & M. 57.

<sup>1</sup> *Earl of Portsmouth*, by his committee, v. *Countess of Portsmouth*, 1 Hag. 355; *Wilkinson v. Wilkinson*, 4 N. of C. 295.

evidence produced before It, that the ground of nullity existed at the time of the alleged marriage.<sup>2</sup>

If there is evidence of disease of mind, the Court has no means of gauging the extent of the derangement consequent upon the disease or affirming the limits within which the disease might operate to obscure or divert the mental power.<sup>3</sup>

#### CONSANGUINITY OR AFFINITY.

Previously to the passing of Lord Lyndhurst's Act, a 5 & 6 Wm. IV, c. 54, making voidable marriages void after August 31, 1835, marriage between persons within the prohibited degrees of consanguinity or affinity was a canonical and not a civil disability, and was voidable only by sentence of the Ecclesiastical Court during the lifetime of both parties;<sup>4</sup> but by the 2nd section of 5 and 6 Wm. IV, c. 54, it was enacted that all marriages which shall be hereafter celebrated between persons within the prohibited degrees of

<sup>2</sup> *Earl of Portsmouth's case, ut supra.*

See the Acts, 15 Geo. II, c. 30, and 51 Geo. III, c. 37, by which the marriage of any person found lunatic by a commission is declared null and void.

<sup>3</sup> *Hancock v. Peaty*, L. R. 1 P. & D. 335; 36 L. J. P. & M. 57. This was a suit brought on the part of the woman on the ground of her insanity. A guardian *ad litem* having been duly assigned to her by the Registrar, the Court declined during the hearing of the petition to adjourn the case on the application of the respondent on the suggestion of the petitioner's recovery and of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, and proceeded to determine the only issue raised; whether the woman was of sound mind at the time of her marriage.

The Court being satisfied that she was of sound mind at that time, postponed pronouncing Its decree in order to give the respondent an opportunity, if so advised, of establishing the fact of her recovery, and intimated that if satisfied of her recovery, It would not pronounce a decree except at her instance. The guardian *ad litem*, after a lapse of three weeks from the delivery of the judgment, obtained a rule *nisi* for the respondent to show cause why a decree should not be pronounced, and the respondent not showing cause against the rule, the decree of nullity was pronounced.

<sup>4</sup> See *Elliott v. Gurr*, 2 Phill. 16.



consanguinity and affinity shall be absolutely null and void to all intents and purposes whatsoever.<sup>5</sup>

Legal without natural consanguinity is a sufficient bar, and a marriage within the prohibited degrees is equally unlawful between legitimate as between illegitimate relations.<sup>6</sup>

But marriage is necessary to create the degree of affinity which makes a subsequent marriage unlawful on the ground of affinity.

In *Wing v. Taylor*,<sup>7</sup> the husband petitioned for a decree of nullity of marriage on the ground of his having had intercourse with his wife's mother before his marriage with his alleged wife. The question was argued on demurrer, and it was held that affinity could not be so constituted by the law of England.

#### PRIOR MARRIAGE.

Either party may petition for a decree of nullity of marriage by reason of the other party having been at the time of the celebration of the marriage in question the spouse of another. The questions to be determined in such a suit are the validity of the prior marriage, and the co-existence of the parties at the time of the second ceremony. Other considerations may, however, arise.

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<sup>5</sup> For the prohibited degrees and discussions respecting them; see Leviticus, chap. xviii. and the commentators; 32 Hen. VIII. c. 38, and Coke's exposition upon that statute, 2 Inst. 683; *The Queen v. Chadwick*, and other cases, 11 Q. B. 173; *Wing v. Taylor*, 2 S. & T. 278; *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447. See also *Sherwood v. Ray*, 1 Moo. P. C. C. 353.

<sup>6</sup> *Haines v. Jeffell*, 1 Ld. Raym. 68; *Woods v. Woods*, 2 Curt. p. 521; *The Queen v. the Inhabitants of Brighton*, 1 B. & S. 447.

<sup>7</sup> 2 S. & T. 278; 30 L. J. P. & M. 258.

Again, in *Pagani v. Pagani & Vining*, L. R. 1 P. & D. 223; 35 L. J. P. & M. 87, a plea by the respondents that the petitioner's marriage was invalid by reason of his prior intercourse with his wife's sister was rejected on demurrer.

In *Birt v. Boutinez*,<sup>8</sup> an Englishwoman had been married to Boutinez, a Belgian, in Scotland. They afterwards went through a second ceremony of marriage in Belgium, where Boutinez was domiciled; and after some years' cohabitation, a Belgian Court, of competent jurisdiction, pronounced a divorce, on the ground of mutual consent, dissolving the Belgian marriage, but not purporting to affect the Scotch marriage. The woman afterwards married Birt in England. On his petition, the Court, holding that the Scotch marriage was valid and subsisting, pronounced his marriage null and void.<sup>9</sup>

#### DEFENCES IN SUITS OF NULLITY.

There is, properly speaking, no defence which can be pleaded in answer to any suit for a declaration of nullity of marriage except a traverse of the allegations in the petition.

To a suit by either party on the ground of impotency or malformation, neither adultery, nor cruelty can be alleged, for if the marriage be invalid, there can be no matrimonial offence.<sup>1</sup>

The effect of delay in those suits has been fully considered; but lapse of time is no bar to suits under the Marriage Acts,<sup>2</sup> or on the other grounds, except so far as it may affect the value of the evidence adduced.

Nor does the principle that a man cannot take advantage of his own wrong apply to these suits; misconduct, therefore, however gross, of the person proceeding in a

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<sup>8</sup> L. R. 1 P. & D. 487; 37 L. J. P. & M. 50.

<sup>9</sup> The question was raised and discussed, but it was not necessary to determine it: whether the Court could have recognized the Belgian decree of divorce, if it had purported to dissolve the Scotch marriage.

<sup>1</sup> *Anonymous*, Deane, 295; *Humphrey v. Williams*, 29 L. J. P. & M. 62; *Taverner v. Ditchford*, 33 L. J. P. & M. 105.

<sup>2</sup> *Johnston v. Parker*, 3 Phill. 39, where upwards of twenty years had intervened between the marriage and the suit—*Duins v. Donovan*, 3 Hagg. 301, where a marriage in 1813 was inquired into in 1830.

suit on the ground of bigamy,<sup>3</sup> cannot be alleged. It is doubtful, however, whether, a man marrying a woman with a full knowledge that she was at the time insane would not afterwards be estopped from alleging her insanity as a ground of nullity, having treated her as sane when it served his purpose to do so.<sup>4</sup>

#### COSTS.

The responsibility for the costs in suits of nullity must depend upon the circumstances of the case and the conduct of the parties;<sup>5</sup> and in the wide discretion given to the Court by the 51st section of the Divorce Act, It may make such order as to costs as may seem just.

In *T. v. D.*<sup>6</sup> the wife having failed to establish her suit on the ground of her husband's impotency, the Court ordered that the wife's costs of the hearing should be paid by the husband to the extent of the security deposited by him in the Registry.

In *Lewis v. Hayward*,<sup>7</sup> the House of Lords declined to make any order as to costs; and subsequently, on an application to the Judge Ordinary with respect to costs, he held that under the circumstances, he had no power to make any order; and also directed that a copy of the decree made by the House of Lords should be recorded

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<sup>3</sup> *Miles v. Chilton*, 1 Roberts, 684, where a responsive allegation by the woman, pleading that the man had by false representations of a divorce having been obtained from her husband, induced her to contract the second marriage, was rejected.

<sup>4</sup> *Hancork v. Peaty*, L. R. 1 P. & D. 341; 36 L. J. P. & M. 57.

<sup>5</sup> In *Aughtie v. Aughtie*, 1 Phill. p. 203, where the marriage was annulled by reason of affinity at the suit of the *de facto* wife, no costs were given, the parties being very much *in pari delicto*. In *Fellowes v. Stewart*, 2 Phill. 260, costs were given against the *de facto* husband, the fraud in the publication of banns having been on his part only.

<sup>6</sup> L. R. 1 P. & D. 127; 35 L. J. P. & M. 51.

<sup>7</sup> L. v. H. L. R. 1 P. & D. 293; 36 L. J. P. & M. 76.

on the files of the Court upon a copy of such decree, verified by affidavit, being deposited in the Registry.

In *M. falsely called O. v. O.*<sup>8</sup> the wife, having failed to establish her case, and having separate property, was condemned in costs.

In *Midgeley v. Wood*,<sup>9</sup> where the man induced the woman to consent to the undue publication of banns by telling her that it would be a good marriage, he was condemned in costs; but in *Wells v. Wells* and *Cottam*,<sup>1</sup> a suit by the father of the *de facto* husband, a minor, where the woman gave no evidence and her defence was unnecessary, the Court made no order as to her costs.

In *Hancock v. Peaty*,<sup>2</sup> the next of kin having delayed instituting the suit for three years, and the respondent having in the meantime contributed to the petitioner's support, the Court made no order as to costs.

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<sup>8</sup> L. R. 2 P. & D. 414; 41 L. J. P. & M. 37.

<sup>9</sup> 4 S. & T. 267.

<sup>1</sup> 3 S. & T. 593.

<sup>2</sup> L. R. 1 P. & D. 335; 36 L. J. P. & M. 57.

## CHAPTER VI.

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### *Of the Suit for Restitution of Conjugal Rights—Defences. —Suit for Jactitation of Marriage.*

THE suit for restitution of conjugal rights is founded on the doctrine that by law married persons are bound to live together ; and if either withdraw from cohabitation without lawful excuse, the other may by suit compel the party withdrawing to return to cohabitation.<sup>1</sup>

Practically, however, the suit is usually founded on pecuniary motives : and is either brought by the wife, for the purpose of enforcing maintenance, or by the husband, because the wife has property settled upon herself. But into these considerations the Court does not enter, and unless such legal defence can be set up as is presently to be stated, always favours the suit.<sup>2</sup> But the utmost the Court can do is to compel conjugal cohabitation : It cannot for sufficiently obvious reasons, enforce matrimonial intercourse ; a suit therefore cannot be maintained

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<sup>1</sup> It is not necessary to state in the petition that the respondent has withdrawn from cohabitation since any particular date: it is enough to allege that the party withdrawing has refused and still refuses to render to the petitioner conjugal rights. See Rules 175, 176, in Appendix.

<sup>2</sup> *Scott v. Scott*, 4 S. & T. 113; L. J. P. & M. 23.

In *Crothers v. Crothers*, L. R. 1 P. & D. 568, where the wife's suit appeared to be founded on a desire to obtain alimony, and the husband in his answer, stated his willingness to take her home, the Court, without giving any directions as to the mode of trial, ordered the matter to be adjourned into chambers.

where the parties are living in the same house, and have merely parted beds.<sup>3</sup>

The petitioner must be free from any matrimonial offence. In *Hope v. Hope*,<sup>4</sup> the question was raised whether, when both parties have been found guilty of adultery, the guilt of the wife is to be considered as abolished by that of the husband, so as to restore her to the condition of an innocent person with reference to her conjugal rights;<sup>5</sup> and it was held that although it may not be competent to either party to obtain the assistance of the Court to punish the offence committed, it by no means follows as a reasonable consequence that each shall be bound to treat the other as an innocent person; and that the wife's suit for restitution could not be sustained.<sup>6</sup>

At the hearing of the case, the principal evidence must of course be that of the parties; and although the suit may not be defended, the Court will not make a decree merely upon proof of the marriage: evidence of the facts of the case must be given.<sup>7</sup>

#### DEFENCES.

As a general rule, nothing can be pleaded in bar to a suit for restitution except such facts as would constitute

Adultery,  
cruelty,  
desertion.

<sup>3</sup> *Orme v. Orme*, 2 Add. 382. *Rowe v. Rowe*, 4 S. & T. 162, where an allegation by the husband, in answer to the wife's suit for judicial separation, that she had withdrawn herself from his bed and refused him conjugal rights, was ordered to be struck out.

<sup>4</sup> 1 S. & T. 94.

<sup>5</sup> The argument was founded on the doctrine of compensation: *Paria crimina compensationes mutua delentur*. As Sir C. Cresswell observed, "a singular kind of subtraction—to subtract crime from crime, and there remains nothing but innocence."

<sup>6</sup> As a contrary decision, see the Irish case of *Seaver v. Seaver*, 2 S. & T. Append. p. 665, in which it was held that where both parties had been guilty of adultery, the Court would, at the suit of one of them, make a decree for restitution of conjugal rights. This decision was in 1846, but was not reported at the date of the judgment in *Hope v. Hope*.

<sup>7</sup> *Pearson v. Pearson*, 33 L. J. P. & M. 156; *Scott v. Scott*, 4 S. & T. 113; 34 L. J. P. & M. 23.

a matrimonial offence, such as adultery or cruelty,<sup>8</sup> or desertion for two years.

Therefore, although in some cases, answers have been admitted containing charges not so specifically pleaded as they would be required to be if alleged in a petition for divorce,<sup>9</sup> and in others, attempts have been made to rest a defence on grounds less definite than those above stated,<sup>1</sup> the principle has never been departed from in the decision of any suit, that such a matrimonial offence must be proved as would justify the Court not only in refusing a decree of restitution, but also in decreeing, if the respondent asks it, a sentence of separation.<sup>2</sup>

Violence on the part of a wife under the influence of

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<sup>8</sup> *Holmes v. Holmes*, 2 Lee, 116. In *Burroughs v. Burroughs*, 2 S. & T. 303, a plea of a "reasonable suspicion of adultery" was rejected on demurrer.

*Moore v. Moore*. 3 Moo. P. C. C. 84, where the husband's answer containing charges of adultery not specific enough to found a suit for divorce were admitted. *Stace v. Stace*, 37 L. J. P. & M. 51, where the Court refused to reject on demurrer an answer alleging facts which might or might not constitute a case of cruelty.

<sup>1</sup> In *Molony v. Molony*, 2 Add. 249, the wife pleaded that her husband, the petitioner, had no residence but one in Ireland, and such was her state of health, it was the opinion of her medical advisers that she could not return to live in Ireland without peril to her health, perhaps to her life. The Court admitted the allegation, not choosing to decide that the facts pleaded were wholly irrelevant, especially the wife's state of health. The case, however, went no further.

<sup>2</sup> In *Connelly v. Connelly*, 2 Roberts, 201; 7 N. of C. 444, the wife's answer to her husband's suit, in which she pleaded that the parties had abjured the Protestant faith and embraced that of Rome; that the husband had, by the authority of the Pope, taken holy orders in the Church of Rome, and she, after a vow of perpetual chastity, had entered a convent; that the parties by mutual consent might under such circumstances, by the law of the Roman Catholic Church, lawfully separate in order that they might enter into religion; and that such separation, approved and allowed by the Pope, debarred the parties from matrimonial cohabitation, was rejected. On appeal, 7 Moo. P. C. C. 438, the allegation was admitted, and directed to be reformed by pleading the law of Pennsylvania—the marriage having taken place at Philadelphia in that State—as applicable to the circumstances, in case the suit had been brought to adjudication there, and also the domicile of the husband at the time of the transactions at Rome.

insane delusions cannot be alleged by the husband in answer to her suit.<sup>3</sup>

The respondent may in the answer pray for a judicial separation, and in such a case has a right to proceed and prove the allegations in the answer on which the prayer is founded, although the petitioner may desire to withdraw the suit for restitution.<sup>4</sup>

It has been contended that according to the *dicta* to be found in some ecclesiastical cases, the same strictness of proof ought not to be required in support of a matter pleaded by way of defence as when the same matter is alleged in a petition,<sup>5</sup> but there is no decided case to that effect; and in *Sopwith v. Sopwith*,<sup>6</sup> it was held on demurrer that the respondent was estopped from pleading in answer to her husband's suit for restitution, the same charges of adultery which she had alleged, but failed to prove against him in her suit for judicial separation.

A deed of separation or an agreement between husband and wife to live apart is no bar to a suit by either for restitution of conjugal rights;<sup>7</sup> but such a deed may be alleged in answer to an allegation in the petition, that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner.<sup>8</sup>

<sup>3</sup> See *Hayward v. Hayward*, 1 S. & T. 81.

<sup>4</sup> *Blackborne v. Blackborne*, L. R. 1 P. & D. 563; 37 L. J. P. & M. 73.

<sup>5</sup> *Forster v. Forster*, 1 Consist. p. 153; *Bramwell v. Bramwell*, 3 Hagg, 619.

<sup>6</sup> 2 S. & T. 160.

<sup>7</sup> *Spering v. Spering*, 3 S. & T. 211.

In *Warrender v. Warrender*, 2 Cl. & Finn. p. 527, Lord Brougham said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever—for any purpose whatever, save and except only one—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed."

<sup>8</sup> *Anquez v. Anquez*, L. R. 1 P. & D. 176; 35 L. J. P. & M. 93.



The decree and its enforcement. If by the answer the validity of the marriage is put in issue, the cause may assume the shape of a suit of nullity of marriage.<sup>9</sup>

When a decree has been made at the suit of the wife, and served upon the husband, ordering him to take his wife home, he is bound to take the first step by inviting her to return to him.<sup>1</sup> When the decree is made at the suit of the husband, it is the wife's duty to obey the order and return home.

The party not obeying such order is, in either case, liable to attachment for contempt; and if imprisoned, can only be released upon signifying a *bonâ fide* willingness to comply with the order of the Court.<sup>2</sup>

When the respondent is out of the jurisdiction, the Court may enforce Its order by sequestration.

In *Miller v. Miller*,<sup>3</sup> a decree having been pronounced at the suit of the husband—the charges which the wife made in her answer having been abandoned at the hearing—and the Court being satisfied that the respondent had a sufficient separate income, condemned her in the costs of the proceedings. The respondent was abroad, and though she paid the costs, did not obey the order of the Court to return to her husband. The Court directed a writ of sequestration to issue against her estate, in the first instance, without attachment.<sup>4</sup>

#### JACTITATION OF MARRIAGE.

Jactitation is where a person boasts or gives out that

<sup>9</sup> *Swift v. Swift*, 4 Hagg. 139.

<sup>1</sup> *Alexander v. Alexander*, 2 S. & T. 385.

<sup>2</sup> See *Barlee v. Barlee*, 1 Add. 301.

<sup>3</sup> L. R. 2 P. & D. 13, 54; 39 L. J. P. & M. 4.

<sup>4</sup> 39 L. J. P. & M. 38.

The question as to what property might be subject to the writ was reserved; but, ultimately, the suit was settled. .

he or she is married to the other ; and the suit is instituted to put a stop to such jactitation.<sup>5</sup>

In answer, the party proceeded against might justify the jactitation and plead marriage. If the marriage was not proved, the jactitator was "enjoined to perpetual silence on the subject."<sup>6</sup>

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<sup>5</sup> These suits appear to have been not uncommon in the Ecclesiastical Courts till about the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy. *State Trials*, vol. xx, 355.

<sup>6</sup> *Walton v. Rider* ; *Wescombe v. Dods*, 1 Lee's Eccl. cas. 16, 59. And see *Hawke v. Corri*, 2 Consist. 280.

Jactitation seems, however, to be no longer practised: at least, there are no suits, although the possibility of their legal existence was recognized by the Divorce Act.

## CHAPTER VII.

*Provision for Wife: Alimony pendente lite—Permanent Alimony on Sentence of Judicial Separation—Permanent Provision for the Woman on Decree of Dissolution of Marriage—Settlement of Damages.*

THE subjects to be treated of in this chapter may be conveniently reduced under the following divisions : first, alimony pending the suit ; secondly, permanent alimony after a sentence of judicial separation ; thirdly, permanent provision for the woman after a decree of dissolution of marriage ; and herein, of the settlement of the damages recovered from the co-respondent for the benefit of the respondent or the children of the marriage.

*Alimony pendente lite* is that allowance which the wife, whether petitioner or respondent in any matrimonial suit,<sup>1</sup> is entitled to receive from her husband in proportion to

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<sup>1</sup> By s. 32 of the Divorce Act, upon any petition for dissolution of marriage, the Court has the same power to make interim orders for payment of money by way of alimony or otherwise to the wife as It would have in a suit instituted for judicial separation. That she has not answered a charge of adultery does not affect her right to alimony, for she is presumed to be innocent until proved guilty. So also in a suit of nullity, for there is at least a *de facto* marriage: until it is pronounced void, she is presumed to be a wife. *Bird alias Bell v. Bird*, 1 Lee, 209 ; *Miles v. Chilton*, 1 Roberts. 684. And this is so, even though fraud in procuring the marriage is expressly charged against her. *Countess of Portsmouth v. Earl of Portsmouth*, 3 Add. 63.

Nor does the fact that there is a plea to the jurisdiction of the Court affect Its power to allot *alimony pendente lite*. In *Ronalds v. Ronalds*, L. R. 3 P. & D. 259, where there was a substantial question of jurisdiction, and some months were to elapse before it could be determined, the Court allotted *alimony pendente lite*.

his means, and the payment of which the Court enforces in order that she may be subsisted pending the litigation which is to determine the rights of the parties. The rule is founded on the assumption that the wife has no separate fortune, that by marriage everything becomes the property of the husband, and that having no other means of support; unless the husband is ordered to give up a fair proportion of his income to her, she will be without the means of subsistence. Where, however, the foundation of the rule is taken away, the rule fails.

Alimony is therefore to be considered, first, as allotted in proportion to the husband's means; secondly, when it is refused by reason of the wife having independent means; thirdly, when it cannot be allotted by reason of the husband having no income, or means so small that they cannot be taken into account, for, *de minimis non curat lex*.<sup>2</sup>

With respect to the petition, it is only necessary to say that the wife should state her husband's means as accurately as possible: exaggeration only causes needless disputes. The husband, in his answer,<sup>3</sup> should set out his income for the three years at least preceding the institution of the suit:<sup>4</sup> if the answer be unsatisfactory, he may be required to give a further and fuller answer, by summons before one of the Registrars.<sup>5</sup> If he files no answer within the time allowed<sup>6</sup>—eight days—the Court may make a peremptory order upon him to file an answer within a certain time.<sup>7</sup> Whether the husband answers the petition or not, he may either be ordered to

Petition  
for  
alimony.

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<sup>2</sup> For the procedure on petitions for alimony, see Rules 81 to 94, and 189 and 192, and Forms of Petitions and Answers in Appendix. All applications for allotments of alimony are now referred, in the first instance, to one of the Registrars at the principal Registry. See Rule 191.

<sup>3</sup> Rule 84.

<sup>4</sup> *Williams v. Williams*, L. R. 1 P. & D. 370; 36 L. J. P. & M. 39.

<sup>5</sup> Rule 189.

<sup>6</sup> Rule 84.

<sup>7</sup> *Snowdon v. Snowdon*, L. R. 2 P. & D. 200; 40 L. J. P. & M. 29.

attend for the purpose of being examined and cross-examined, or the wife may subpoena him as a witness on her petition,<sup>8</sup> and if he fails to attend on his subpoena, he will be liable to an attachment.<sup>9</sup> At the hearing of the investigation, the wife and other witnesses may be examined; but if the husband has not filed an answer, he cannot cross-examine the witnesses or contradict their evidence.<sup>1</sup>

Where substituted service had been allowed of the petition, and of the petition for alimony, of which the husband had taken no notice, the wife was allowed to examine witnesses in support of her petition for alimony without giving the usual four days' notice.<sup>2</sup>

Under special circumstances, and to save the expense of bringing witnesses from a great distance, the respondent's income may be allowed to be proved by affidavits, proper notice being first given to the respondent.<sup>3</sup>

Alimony *pendente lite* may be applied for at any time before the hearing of the cause;<sup>4</sup> but it cannot be allotted after the wife has been found guilty of adultery—after a decree *nisi* has been pronounced at the suit of the husband.<sup>5</sup>

Mode of  
estimating  
income.

In estimating the husband's income for the purpose of allotting alimony, the value of all marketable securities and property of every kind convertible into money may be included in the calculation; and such property as is unproductive—furniture, for instance, may be chargeable with a percentage.<sup>6</sup> Reversionary property—that is,

<sup>8</sup> *Anderson v. Anderson*, L. R. 1 P. & D. 512; 37 L. J. P. & M. 64, and Rules 86, 89, 191.

<sup>9</sup> *Jennings v. Jennings*, L. R. 1 P. & D. 35; 35 L. J. P. & M. 12.

<sup>1</sup> *Constable v. Constable*, L. R. 2 P. & D. 17; 39 L. J. P. & M. 17.

<sup>2</sup> *Robinson v. Robinson*, 41 L. J. P. & M. 40, and see Rule 89.

<sup>3</sup> *Mumby v. Mumby*, 38 L. J. P. & M. 72.

<sup>4</sup> *Phillips v. Phillips & Medlyn*, 4 S. & T. 129; 34 L. J. 107.

<sup>5</sup> *Winstone v. Winstone & Dyne*, 2 S. & T. 246; *Noblett v. Noblett & Kershaw*, L. R. 1 P. & D. 651.

<sup>6</sup> See *Hayward v. Hayward*, 1 S. & T. 85.

property in which the husband is entitled to a vested interest expectant on the death of some person or the happening of some other contingency—may properly be stated; but the reasonableness of charging it with alimony must depend upon the circumstances.<sup>7</sup> With respect to professional and trade incomes, the Court looks to the average earnings of the husband during the last few years, and generally will assume that in the current year his earnings will be at about the same rate—a medical man, for instance, may be presumed to derive as large an income in future years as in past—although when his answer to the petition for alimony is filed, he may for a time be out of employment.<sup>8</sup>

As alimony is allotted, not upon the gross, but upon the net income, in order to arrive at the latter amount, certain deductions are allowed to be made. Where the income is derived from real property, the expense of ordinary current repairs may be deducted, but not of extraordinary and permanent improvements which ought to be charged on the total fund of the income.<sup>9</sup> With respect to house property, the gross rental should be stated, and then the particulars of the charges and outgoings claimed to be deducted from the rent. So with income derived from trade, the gross annual income

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<sup>7</sup> *Stone v. Stone*, 3 Curt. 341. In *Bruere v. Bruere*, 1 Curt. 566, alimony *pendente lite* was refused, the husband having taken the benefit of the Insolvent Act, but as it appeared that he would be entitled to an income in reversion after his father's death, the Court stayed the proceedings until some small sum by way of maintenance was afforded to the wife.

<sup>8</sup> As in *Thompson v. Thompson & Johnson*, L. R. 1 P. & D. 553; 37 L. J. P. & M. 33, where the husband in his answer stated that he earned as master mariner £144 per ann.; that he was then out of, and had no present prospect of obtaining employment; and that he owned one-fourth part of a certain vessel, the market value of which fourth part was, at most, £500. The Court estimated his income at £160, and allotted the wife £32 a year.

<sup>9</sup> *Hayward v. Hayward*, 1 S. & T. 85.

should be stated and the deductions to be claimed specified.<sup>1</sup>

Life  
Policies.

In general, the husband is not allowed to deduct sums paid by way of premium to maintain a Policy of Assurance on his life, inasmuch as it is capable of being converted into money;<sup>2</sup> but where such a Policy was under settlement for the benefit of the wife and children after the husband's death, and the premium was deducted from his salary, and paid to the Assurance Office by his employers, the amount of premium so deducted was allowed in estimating his income.<sup>3</sup>

Amount  
of alimony.

Alimony pending the suit is usually allotted at the rate of one-fifth of the husband's *net* income as a fair medium; but the proportion is not subject to any strict rule, and is liable to variation—from about one-third to one-sixth—according to circumstances.<sup>4</sup> In *Hawkes v. Hawkes*,<sup>5</sup> a suit by the husband, his income as an officer in the army in India was admitted to be £1700 per annum. The Court, considering his expenses, and that he had three children to educate and maintain, allotted his wife £250 per annum.

In *Harris v. Harris*,<sup>6</sup> the husband had two children to

<sup>1</sup> *Nokes v. Nokes*, 3 S. and T. 529; 33 L. J. P. & M. 24.

See also *Crampton v. Crampton & Armstrong*, 32 L. J. P. and M. 142.

<sup>2</sup> *Harris v. Harris*, 1 Hagg. 351.

<sup>3</sup> *Forster v. Forster & Thomas*, 2 S. & T. 553. Where the husband had contracted to pay a debt by annual instalments, the amount of each instalment was allowed to be deducted from his annual income; but not the premiums on a policy on his life. *Patterson v. Patterson & others*, 33 L. J. P. & M. 36.

<sup>4</sup> In *Smith v. Smith*, 2 Phil. 152, the husband's income being taken at £1500, and the wife having £300 separate allowance, £200 in addition was allotted.

<sup>5</sup> 1 Hagg. 526.

<sup>6</sup> 1 Hagg. 351.

It has been held that the fact that a husband has several children, the issue of a former marriage, to maintain, is no ground for allotting less than one-fifth, *Hill v. Hill*, 33 L. J. P. & M. 104; but in *Bird alias Bell v. Bird*, 1 Lee, 418, where the man was an anvil maker, and got by his trade £100

educate and maintain, and the expenses of the suit to pay. The Court estimating his income at £250 per annum derived from shares in certain Insurance Offices, although at the time such shares were not actually productive of income, allotted the wife £75 per annum; but directed that certain debts incurred by her and paid by him should be first deducted. So in *Hayward v. Hayward*,<sup>7</sup> the husband's responsibility for debts incurred by the wife<sup>8</sup> was taken into consideration, and on an estimated income of £600 per annum, to be derived from various real and personal property, £150 per annum was allotted.

If the husband's income has been reduced since the original allotment of alimony, the alimony may be reduced in proportion on proof of such reduction, as in *Cox v. Cox*,<sup>9</sup> where it appeared that the husband's income had been diminished in consequence of the reduction of his stipend under Government, without any default on his part; but if it does not appear how the income came to be diminished, or how a sum of money has been spent, as in *Shirley v. Wardrop*,<sup>1</sup> where Colonel Shirley failed to explain how a sum of money which he had received for his commission had been spent—the Court may decline to interfere.

Reduction  
of alimony  
by reason  
of reduced  
means.

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a year clear, and was worth about £1000; had three children by a former wife, and ten grandchildren, whom he at times assisted with money; alimony *pendente lite* was allotted at £20 a year.

<sup>7</sup> 1 S. & T. 85.

In *Weber v. Weber & Pyne*, 1 S. & T. 219, the husband's income did not clearly appear, but as he had under a deed of separation allowed his wife £52 a year, which he had ceased to pay after the date on which he alleged that he had obtained evidence of her adultery, the Court made an order for alimony at the same rate.

<sup>8</sup> That is to say—to a reasonable amount according to the social position of the parties. The Court will not assume that the husband would be held liable to pay extravagant debts which he had never sanctioned.

<sup>9</sup> 3 Add. 276. His income had been reduced from £1680 to £1080, and the alimony was reduced from £300 to £220.

<sup>1</sup> 1 S. & T. 317.



Alimony  
refused  
when wife  
has means  
of her  
own.

Where the wife is in possession of an income, whether derived from property settled to her separate use, or from her own earnings—as in the case of a husband and wife supporting themselves by tuition or in service—the Court will take it into account; and if it appears that the wife has long lived apart from her husband without an allowance, and that she has been and continues able to provide sufficient means for her decent subsistence, may refuse to allot alimony.

In *Goodheim v. Goodheim* and *Frankinson*,<sup>2</sup> it appeared that the husband's net annual income was about £100; that his wife when she left him took with her furniture and linen to the value of about £80; and that she was occupying a house and maintaining herself in comfort by letting lodgings; alimony was refused.<sup>3</sup> So if the wife is in possession of property which would enable her to maintain herself pending the suit: as in *Bremner v. Bremner* and *Brett*,<sup>4</sup> where the husband by his answer admitted an income of £600, but alleged that his wife had during his absence left his house, and removed all his furniture and other property, worth upwards of £800; the Court refused on that state of things to make any order, but allowed the wife to file affidavits in reply: subsequently, alimony was allotted by consent.

In *Coombs v. Coombs*,<sup>5</sup> the husband's net income from his business as a baker did not amount to more than £60 a year, and the wife had a sum of £70 in her possession at the commencement of the suit: alimony was refused.

In *Eaton v. Eaton* and *Campbell*,<sup>6</sup> the wife had an

<sup>2</sup> 2 S. & T. 250.

So in *Burrows v. Burrows*, and *George v. George*, L. R. 1 P. & D. 554; 37 L. J. P. & M. 17, the wives had been living apart from their husbands for some years and supporting themselves in service: in both cases, alimony was refused, although the husbands had respectively incomes of £200 and £225 a year.

<sup>4</sup> 3 S. & T. 249; 32 L. J. P. & M. 119.

<sup>5</sup> L. R. 1 P. & D. 218.

<sup>6</sup> L. R. 2 P. & D. 51.

allowance from her father of £100 a year, paid in one sum in the month of March each year, in pursuance of a written promise from him to her husband. The Court refused to make any order for alimony, the husband having very small means, the month not having arrived when the allowance might be expected to be paid.

On the same principle, the wife is not entitled to alimony while she is living with the co-respondent, and is supported by him; not because she is living in adultery, but because she has means of support independent of her husband.<sup>7</sup>

So also, where a woman has been living apart from her husband under a deed of separation, by which an allowance has been secured to her, upon which she has been content to live for some years; the mere fact that the husband has instituted a suit against her does not entitle her to an increased allowance by way of alimony *pendente lite* estimated on the husband's increased income. In *Powell v. Powell and Jones*,<sup>8</sup> it appeared that the husband and wife had been living apart for a great number of years; that under a deed of separation he had covenanted to pay an annuity to his wife, and had continued to pay it. Upon his instituting a suit on the ground of her adultery, she petitioned for alimony by reason of his having acquired a considerable increase of fortune. The Court refused her application.

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<sup>7</sup> In *Holt v. Holt & Davis*, L. R. 1 P. & D. 610; 38 L. J. P. & M. 33, it appeared that the respondent had been living with the co-respondent from the time of the service of the citation in February 1868, till the 21st August 1868. The husband having admitted an income of £500, the Court allotted her £100 per annum, to commence from the 21st August.

And see *Madan v. Madan & De Thoren*, 37 L. J. P. & M. 10.

But the Court refused to rescind an order for alimony on an allegation upon affidavits that the wife was maintaining herself by prostitution, she in her affidavit denying the charge, which was the main question in the suit. *Patch v. Patch*, 38 L. J. P. & M. 27.

<sup>8</sup> L. R. 3 P. & D. 55, and on appeal, 186; 42 L. J. P. & M. 44, and on appeal, 43 L. J. P. & M. 9. The Court refused to allow the wife's costs of appeal to be taxed against the husband.

When the husband is without means.

Where the husband has no income, or means so small that they cannot be legally taken into account, it follows that alimony cannot be allotted: as in *Fletcher v. Fletcher*,<sup>9</sup> where the husband, a master pilot in Her Majesty's Bengal Pilotage Service, had obtained leave of absence for six months without pay in order to institute his suit, and was neither possessed of any property nor in receipt of any income whatever, but was entirely dependent on his friends.<sup>1</sup> And in *Brown v. Brown and Simpson*,<sup>2</sup> where the husband's only property—he being maintained by his father—was a legacy of £500, not payable for some months after the application for alimony: the Court refused to allot alimony upon it.

In no case has a free and voluntary allowance made to the husband been considered as income out of which alimony could be allotted.<sup>3</sup>

Nor is the guardian of an infant liable as such to payment of alimony.<sup>4</sup>

Duration of alimony pending suit.

Alimony is usually made payable from the date of the service of the citation in the cause; and may be ordered to be paid in quarterly, monthly, or weekly instalments, according to its amount, and the position and convenience of the parties: its duration depends upon the nature of the suit.

In a suit by the husband for dissolution of marriage tried before the Court itself, the alimony ceases on the decree *nisi* being pronounced: when the cause is tried before a jury, it continues payable till the time has elapsed for moving for a new trial; and if that is refused by the Court, till the further time for appealing from

<sup>9</sup> 2 S. & T. 434.

<sup>1</sup> Where the husband was in insolvent circumstances, and had only weekly wages of meat, drink, washing, lodgings, and 4s a week, alimony was refused. *Capstick v. Capstick*, 33 L. J. P. & M. 105.

<sup>2</sup> 3 S. & T. 217.

<sup>3</sup> *Haviland v. Haviland*, 3 S. & T. 114.

<sup>4</sup> *Beavan v. Beavan*, 2 S. & T. 652; 31 L. J. P. & M. 166.

such refusal has elapsed,<sup>5</sup> and when a rule for a new trial has been granted in such a suit, the alimony *pendente lite* continues payable without any fresh order.<sup>6</sup>

When the wife is petitioner for dissolution of marriage her alimony continues payable until the decree is made absolute.

In *Whitmore v. Whitmore*,<sup>7</sup> the wife had obtained a decree *nisi*; but the Queen's Proctor intervened, shortly before the time for making it absolute, and proved that she had committed adultery while the suit was pending, and the decree was thereupon rescinded. Subsequently, on motion for an attachment against the husband for nonpayment of arrears of alimony *pendente lite*, it was held that she was entitled to alimony up to the date that she was found guilty of adultery.

In a suit for judicial separation, alimony *pendente lite* having been awarded, it will generally continue payable pending an appeal to the full Court.<sup>8</sup>

Permanent alimony<sup>9</sup> is allotted on a more liberal scale than alimony *pendente lite*; and varies in amount from one-third, which is the usual proportion, to one moiety according to the conduct of the parties, their position in life, and the circumstances of the case: namely, whether the husband or the wife has the custody of the children; whether it is made payable out of the joint income of the parties, or out of the separate income of the husband.

Under any circumstances, however, the Court is bound

<sup>5</sup> *Latham v. Latham & Gethin*, 2 S. & T. 299. *Wells v. Wells & Hudson*, 3 S. & T. 543.

<sup>6</sup> *Nicholson v. Nicholson & Ratcliffe*, 3 S. & T. 214.

<sup>7</sup> L. R. 1 P. & D. 96; 35 L. J. P. & M. 39.

<sup>8</sup> See *Jones v. Jones*, L. R. 2 P. & D. 333.

<sup>9</sup> See Rules 91 to 93, and 189 to 192, in Appendix.

In accordance with the procedure of the Ecclesiastical Courts in Divorces *a mensa et thoro*, a petition for permanent alimony may be filed after a decree has been made for judicial separation. *Covell v. Covell* L. R. 2 P. & D. 411; 41 L. J. P. & M. 81; and see Rule 190.

Permanent  
alimony  
after  
decree of  
judicial  
separation.

by the practice of the Ecclesiastical Courts in this respect, and although in some cases it would perhaps be only just that where the fortune originally belonged to the wife, and cohabitation had become impossible by reason of the husband's misconduct, she should receive back the money which she brought to the common fund—the utmost it has power to allot is one moiety of the joint income.<sup>1</sup>

In *Durant v. Durant*,<sup>2</sup> the wife had £120 a year of her own; the husband's net income, after deducting outgoings, mortgages, interest on debts, annuity to his mother, was estimated at £4000. In consideration of the large family he had to provide for—twelve children, sons and daughters—the Court decreed £600 in addition to the wife's separate income.<sup>3</sup>

In *Mytton v. Mytton*,<sup>4</sup> where the husband's cruelty and adultery had been of a very gross description: his real estate being £6000 a year, subject as alleged by him to large incumbrances, the mother's jointure having been £1000, and the wife's pin-money £500 a year, the Court

<sup>1</sup> *Cooke v. Cooke*, 2 Phill. 40, where the bulk of the property having been the wife's, the Court gave a moiety. In *Pomfret v. Pomfret*, referred to in the above case, the position of the husband, as a peer, was considered, and out of his income of £12,000, alimony was allotted at the rate of £4000. *Othway v. Othway*, 2 Phill. 109, where the Court would have given a moiety, but considering that the husband had six children to maintain—the joint income being £5500, the greater part of which came from the wife—allotted her £2000 per annum. *Smith v. Smith*, 2 Phill. 235, the joint income being £2000, and the bulk of the fortune having been the wife's, and the husband having forcibly taken her infant daughter from her, the Court gave a moiety—£1000. In *Haigh v. Haigh*, L. R. 1 P. & D. 709; 38 L. J. P. & M. 37, the entire income of the husband, £341 per annum, was derived from property comprised in a marriage settlement, of which £210 was derived from property formerly belonging to the wife. The Court allotted her £170 per annum, payable quarterly.

<sup>2</sup> 1 Hagg. 528.

<sup>3</sup> In *Kempe v. Kempe*, 1 Hagg. 532, the husband having £750 per annum, £250 was allotted on the understanding that the wife would take charge of the only child, an infant under a year old.

<sup>4</sup> 3 Hagg. 657.

allotted £1000 a year, allowing the husband to deduct from that sum any payment on account of pin-money above £200 a year—the sum agreed to be paid to the wife for the maintenance of the children.

In *Frankfort v. Frankfort*,<sup>5</sup> the husband's income being taken at between £2700 and £3000, £800 a year was allotted as permanent alimony.

In *Deane v. Deane*,<sup>6</sup> the Court on pronouncing a decree of judicial separation on the ground of the husband's adultery—it appearing that his income was £164, and that there were eight children, none of whom were with him—allotted £80 per annum. In *Whieldon v. Whieldon*,<sup>7</sup> the Court having given the wife the custody of the three children, all under seven years of age, allotted her £160 per annum=£100 for herself, £20 for each of the children—the husband's income having been taken at £400 when alimony *pendente lite* was allotted.

In *Todd v. Todd*,<sup>8</sup> it appeared that the wife had an income from property settled on her by the respondent, of £196 a year; and that the respondent had an income of £367 a year. There were three children of the marriage in the custody of the wife. The Court ordered that the respondent should allow her, in addition to her settled income, £30 a year each for the maintenance of the children.

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<sup>5</sup> 3 N. of C. 68. In this case, a bond given by the husband to a woman to provide for her and his illegitimate child was considered not to be given for an immoral consideration, and might therefore be fairly deducted from his income. Subsequently, in the same case, 4 N. of C. 280, the husband having deducted the income tax upon the whole of his property, and the allotment having been made on his net income, he was not allowed to deduct the tax a second time from the payments to his wife.

In *Harmer v. Harmer*, Deane, 282, the husband was not allowed to deduct from permanent alimony sums paid by him on account of debts incurred by the wife before the allotment of alimony *pendente lite*, she not having had at that time any means of subsistence, and having been obliged to separate from him by reason of his cruelty.

<sup>6</sup> 1 S. & T. p. 93.

<sup>7</sup> 2 S. & T. 388.

<sup>8</sup> 42 L. J. P. & M. 62.

The husband's conduct towards his wife as disclosed at the hearing of the cause is also to be considered.

In *Moore v. Moore*,<sup>9</sup> the husband, respondent in a suit on the ground of cruelty, stated on affidavit that, since alimony *pendente lite* had been allotted, he had disposed of his business from which his income was derived, in consideration of a yearly payment of £300 for seven years, and £5 per cent. interest on stock-in-trade, &c. The Court, treating the £300 yearly as income, allotted £150 per annum, observing that the circumstances of the case were not such as to entitle the husband to any indulgence, as he had acted with savage violence to the petitioner, who was much injured in consequence.

Profes-  
sional  
incomes.

In allotting alimony on professional incomes, the Court will take into consideration the circumstance that the husband is obliged, in order to earn such income, to live in a more expensive place than the wife; and in such cases may allot less than the usual proportion, as in *Louis v. Louis*,<sup>1</sup> where alimony had been allotted at the rate of £40 per annum on the husband's income of £120 as a lieutenant in the Indian Army, he being then in England on furlough: on his promotion to a captaincy under orders to proceed to India, where on his arrival his pay would be £480 per annum, the wife applied for an increase of alimony, and the Court, considering the greater expense he would incur by having to live in India, allotted her, instead of £160, which would be the usual proportion, £120 per annum, to commence at the same time as the increased pay of the respondent.

Separation  
at suit of  
husband.

Even when the husband obtains a judicial separation by reason of the cruelty of his wife, she is entitled to a provision in the nature of permanent alimony;<sup>2</sup> and the

<sup>9</sup> 3 S. & T. 606; 34 L. J. P. & M. 146.

<sup>1</sup> L. R. 1 P. & D. 230; 35 L. J. P. & M. 92.

<sup>2</sup> *Prichard v. Prichard*, 3 S. & T. 523, overruling the cases of *White v. White*, 1 S. & T. 591, and *Dart v. Dart*, 3 S. & T. 208, in which Sir C. Cresswell had refused alimony under such circumstances.

Court may make it a condition of pronouncing the decree that such a provision be made for her.<sup>3</sup>

Permanent alimony is allotted in proportion to the actual income of the husband: it may, therefore, be increased or diminished in accordance with his varying fortunes;<sup>4</sup> and as the wife may apply for an increased allowance if she can show that her husband's income has been permanently augmented; so he on the other hand may obtain leave to reduce such allowance on proof of the reduction of his own income or the accession of that of his wife.<sup>5</sup>

Increase or  
reduction  
of per-  
manent  
alimony.

In *Saunders v. Saunders*,<sup>6</sup> alimony having been allotted by the Consistory Court on a decree of divorce *a mensâ et toro* on the ground of cruelty, at £300 per annum by consent, the husband applied for a reduction, his wife having, by her own admission, come into an income of £144 per annum. The Court rejected the application, as there was nothing to show upon what computation the alimony was originally allotted, or that it would be unreasonable, taking into consideration the admitted income of the wife.

Alimony, either pending suit, or permanent alimony, is always made payable to the wife herself, but it may, at her desire, be made payable to her attorney upon a written authority being brought into the Registry from

To whom  
payable.

<sup>3</sup> *Forth v. Forth*, 36 L. J. P. & M. 122. But the husband will not be required to give a bond with sureties to secure the payment of such provision.

<sup>4</sup> For this reason, the Court will not, in allotting alimony on a decree of judicial separation, order the husband to execute a deed charging stock with a yearly payment. See *Hyde v. Hyde*, 4 S. & T. 80; 34 L. J. P. & M. 63.

<sup>5</sup> See *De Blaquiere v. De Blaquiere*, 3 Hagg. 322.

In *Neil v. Neil*, 4 Hagg. 273, permanent alimony having been allotted in 1813 at the rate of £200 upon the husband's then income of £967, the payments of which were constantly in arrear: an application by him in 1832 to moderate the amount on the ground that he had been speculating in unprofitable investments was refused.

<sup>6</sup> 1 S. & T. 72.



the wife authorizing him to receive it.<sup>7</sup> The attorney has a lien upon the alimony so passing into his hands for any costs incurred on her account, and allowable as between attorney and client.<sup>8</sup>

The payment of alimony may be enforced either by writ of *fieri facias*,<sup>9</sup> or by sequestration in general terms against all the goods and chattels of the respondent;<sup>1</sup> or in extreme cases, by attachment.<sup>2</sup>

Permanent provision on decree of dissolution of marriage.

Permanent provision for the maintenance of the woman after a decree of dissolution of marriage may be considered under two heads: first, where she is the petitioner in the cause; secondly, where the husband is the petitioner, and herein, of the settlement for her benefit and of the children, if any, of the damages recovered from the co-respondent.

By the 32nd section of the Divorce Act, the Court may, if it shall think fit on any such decree, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one

<sup>7</sup> *Brown v. Brown*, 4 S. & T. 144; 34 L. J. P. & M. 102. And see Rule 94 in Appendix.

<sup>8</sup> *Es parte Bremner*, L. R. 1 P. & D. 254; 36 L. J. P. & M. 11.

<sup>9</sup> *Ward v. Ward*, 1 S. & T. 484.

<sup>1</sup> In *Clinton v. Clinton*, L. R. 1 P. & D. 215, the Court had made an order on the respondent for payment of permanent alimony at the rate of £110 per annum, so long as he was in receipt of a rent-charge of £400 per annum—his only source of income—the trustees of which had a discretionary power to refuse payment. Before the date of the order, the respondent had become a bankrupt, but though the trustees had continued to pay him the rent-charge, he had not paid the alimony. The Court directed a sequestration in general terms to issue against the property of the respondent, without expressing any opinion as to whether it would touch the fund in question.

<sup>2</sup> See the Rule under the Debtors' Act, in Appendix.

of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties ; and the said Court may in such case if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed.<sup>3</sup>

The Court, in exercising the large discretionary power conferred upon It by this section, has to take into consideration the fortune of the wife (if any), the ability of the husband to pay, and the conduct of the parties as disclosed at the hearing of the cause.<sup>4</sup>

Where the wife is the petitioner, the Court, in construing and applying this section, has held that, though it is not desirable that the wife should have a pecuniary interest in preferring divorce to judicial separation, it is still less desirable that an adulterous husband should have

Where  
wife is  
petitioner.

<sup>3</sup> For the procedure on petitions under this section, see Rules 95 to 103, and 204, in Appendix.

The application must be made by a separate petition to be filed after the decree *nisi* and before the decree absolute; and Rule 98 requiring the husband to file an answer to it on oath will not be dispensed with merely on the ground that the wife has a separate income, as the Court cannot act upon the statute without inquiring into the respective means of the parties. Although the inquiry may be gone into at any time after the decree *nisi*, the order upon it is not made until the decree absolute. See *Charles v. Charles*, L. R. 1 P. & D. 260 ; 36 L. J. P. & M. 17.

<sup>4</sup> In order to meet the "circumstances of those, who with a sufficient income from their labour, have no realized property," the powers of the Court were amended by 29 Vict. c. 32, which after reciting in the preamble the section above set out ; and that whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross sum or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives : enacts S. 1:—"In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable : Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

a pecuniary interest in adding cruelty or desertion to his adultery, and thus evading the permanent alimony allowed on judicial separation, which would be the case if the amount of the maintenance to be accorded to his wife varied, not with his misconduct, but with the form of her remedy. The Court is therefore inclined, where the circumstances admit and justify its doing so—to order the husband to secure the woman on a decree of dissolution of marriage, the same allowance, so long as she remains chaste and unmarried, as he would have to make on a decree of judicial separation.

In *Fisher v. Fisher*,<sup>5</sup> it appeared that the petitioner had no fortune of her own; that the husband had some fortune and trading profits, neither large nor certain; and it was agreed that the daughter should remain with her mother and be maintained by her. Under these circumstances, Sir C. Cresswell thought that he ought not to award more than a maintenance, and directed that so long as the petitioner led a chaste life and remained sole and unmarried, and maintained the daughter, the respondent should pay her an annuity of £100 per annum: in the event of the death or marriage of the daughter, to be reduced to £80.

In *Sidney v. Sidney*,<sup>6</sup> the wife had a separate income of £150, and the respondent, who was proved to have treated her very brutally, had an income, from private and professional sources, of about £1100. Lord Penzance, acting on the principles above stated, with the view of giving the petitioner about the same income she would have received as permanent alimony, decreed that the respondent should secure to her, *dum casta et sola vixerit*, the annual sum of £245, and that it should be referred to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper instrument or deed for that purpose.

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<sup>5</sup> 2 S. & T. 410; 31 L. J. P & M. 1.

<sup>6</sup> 4 S. & T. 178; 34 L. J. P. & M. 122.

As, however, the order for maintenance under this section can only be made on the decree being made absolute; it is of a permanent character, and cannot, like permanent alimony, be varied to meet the varying fortunes of the husband.

Where, therefore, the respondent had only a small professional income, and the petitioner was entitled to a sum in reversion, which was imminent, the Court refused to make any order.<sup>7</sup>

Where the divorce is at the suit of the husband, very different considerations must arise with respect to the conduct of the parties, and the right of the woman to any maintenance at all at the hand of the husband.<sup>8</sup>

By the 33rd section of the Divorce Act, when damages have been assessed against the co-respondent, the Court <sup>Settle-  
ment of  
damages,</sup> has power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

In *Keats v. Keats* and *Monteruma*,<sup>9</sup> the wife having under a marriage settlement the interest after her husband's death of £10,000, and a power to dispose of one-fifth of that sum by will; the Court directed the husband to secure her an annuity during his life of £150, *quamdiu casta vixerit*, on condition of her giving up the

<sup>7</sup> *Rawlins v. Rawlins*, 4 S. & T. 158; 34 L. J. P. & M. 147.

In *George v. George*, 38 L. J. P. & M. 34, the wife had obtained a decree nisi on the grounds of cruelty and adultery. During coverture she had become entitled to a small estate of inheritance, the rents of which, amounting to £45 per annum, her husband continued to receive. On the decree being made absolute, the Court ordered that he should pay her an annuity of £30, to be secured on the property, and to cease if at any time she should recover the property from him.

<sup>8</sup> See *Ratcliffe v. Ratcliffe & Anderson*, 1 S. & T. 474, where the Court, considering all the circumstances and the very limited income of the petitioner, refused to make any order.

<sup>9</sup> 1 S. & T. 334.

power of disposal of the £2000; and with respect to the damages (£1000), directed that sum to go, first, in payment of Mrs. Keats' costs; then to Mr. Keats' costs; and the surplus, if any, in satisfaction of the annuity to be paid to Mrs. Keats.

In *Bent v. Bent and Footman*,<sup>1</sup> the wife having, on her marriage, had a fortune of £1,678, which was not settled but was received by the husband, the Court made an order that he should settle £1000 upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing, the fund should be held in trust for the children of the marriage in equal shares; that the £1000 damages awarded against the co-respondent should be paid to the husband in lieu of the sum he would have to settle; and that the decree should be suspended until the settlement should be made.

In *Callwell v. Callwell and Kennedy*,<sup>2</sup> the Court directed that of the sum of £3000, damages—to be placed in the hands of trustees—£1500 should be expended in the purchase of an annuity for the respondent without power of anticipation; that the other £1500 should be invested in the funds, the interest to be paid to the respondent for her life, and the principal after her death to be paid to her child born after her separation from the petitioner.

In *Narracott v. Narracott and Hesketh*,<sup>3</sup> the Court being dissatisfied with the petitioner's conduct towards his wife—cruelty had been alleged by the co-respondent, but not satisfactorily proved—directed—on pronouncing the decree *nisi*—that the damages, £2,500, should be settled on the respondent "*dum casta vixerit*,"<sup>4</sup> and for life; and that after her death, or on breach of this condi-

<sup>1</sup> 2 S. & T. 392.

<sup>2</sup> 3 S. & T. 259.

<sup>3</sup> 3 S. & T. 408; 33 L. J. P. & M. 132.

<sup>4</sup> On the decree being made absolute, the Court refused to amend the order by inserting "*et sola*," as those words ought to have been suggested at the time the order was made. 4 S. & T. 76; 34 L. J. P. & M. 54.

tion, the fund should devolve on the two children of the marriage.

In *Forster v. Forster and Berridge*,<sup>5</sup> the decree having been made absolute, the Court "directed that the sum of £5000, being the damages assessed in this cause, be paid to the petitioner's solicitor, to be by him applied in the following manner :—that £1000 be paid to the petitioner for his own use ; that an annuity for £120 a year be bought in the names of two trustees on the life of the respondent, and that such annuity be paid by the trustees to the respondent so long as she shall lead a moral and respectable life ; but should the respondent not lead a respectable and moral life, then that her interest in the annuity should be forfeited, and that the trustees should pay such annuity to the two daughters of the marriage, in equal portions, or to the survivor of them ; and that the residue of the said sum should be invested in the purchase of equal annuities for the use of the two daughters of the marriage on their own lives ; and that a deed should be prepared and settled by one of the conveyancing counsel of the Court of Chancery, whereby this order should be effectually carried out through the intervention of trustees, and anticipation of the annuities should be prevented."<sup>6</sup>

In *Meyern v. Meyern and Myers*<sup>7</sup> it appeared that since

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<sup>5</sup> 3 S. & T. 158 ; 32 L. J. P. & M. 206.

<sup>6</sup> After this order was made, the petitioner was put to further expense by appeals, &c., and an agreement was then come to by the petitioner and the co-respondent that the litigation should cease ; that the co-respondent should pay the petitioner £2700 ; that the co-respondent should secure the respondent an annuity of £120 while she lived respectably, and that the petitioner should release the co-respondent from the £5000 damages and costs. The Court refused to sanction this agreement, as it injuriously affected the interests of the respondent and the children, but so far varied the original order as to allow the petitioner to take a larger share of the damages, on the ground that the main intent of the Court had been to reimburse the petitioner the whole expense to which he had been put. *Forster v. Forster & Berridge*, 4 S. & T. 131 ; 34 L. J. P. & M. 88.

<sup>7</sup> L. R. 2 Prob. Div. 254 ; 46 L. J. P. D. & A. 5.

the respondent's separation from the petitioner, she had been supported and visited by the co-respondent, who was a married man. The Court apportioned the damages, £5000, as follows:—£1500 to be settled on the youngest child of the marriage, aged five years, the only one remaining in the petitioner's custody, the money to go to the father in the event of the death of the child before attaining his majority; all the petitioner's extra costs to be paid out of the damages, and a sum of £1500 also to be paid to him; the balance remaining to be applied in the purchase of an annuity for the life of the respondent, to be paid to her so long as she should live chastely, but that in the event of her forfeiting it by reason of her not living chastely, or in the event of her ever becoming the wife of the co-respondent; then the annuity to be paid to the petitioner for his life.

Damages are not however always settled for the benefit of the wife, and though in many cases it is no doubt only just that the pecuniary recompense extorted from the man for the injury he has done in depriving the woman of her home should be applied to her maintenance; the Court may, according to the circumstances—as where the wife's misconduct has been very gross—direct the damages to be settled for the benefit of the children, if any, or to be paid to the petitioner.

In *Clark v. Clark and Bouch*,<sup>8</sup> the damages having been assessed at £250—and not being likely to be paid—the Court directed that the petitioner should assign all his interest in them to a trustee on behalf of the only child; and in case of the child's death under the age of twenty-one and unmarried, that they should revert to the petitioner.<sup>9</sup>

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<sup>8</sup> 2 S. & T. 520; 31 L. J. P. & M. 61.

<sup>9</sup> In *Taylor v. Taylor & Wolters*, 39 L. J. P. & M. 23, damages having been assessed at £150, the Court would not order any part to be settled upon the respondent, but directed them to be applied first to the payment

The application to the Court to give directions respecting the settlement of the damages is usually made on the motion to make the decree absolute;<sup>1</sup> but where it was proved that at the time of the hearing of the cause the respondent was living with the co-respondent, the Court made an order for the payment of the damages to the petitioner—there being no issue of the marriage—part of the decree *nisi*.<sup>2</sup>

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of such part of the petitioner's costs as he should not recover from the co-respondent, and the remainder to be settled upon the child.

<sup>1</sup> Though there is nothing to preclude the Court from settling the damages after the decree has been made absolute. *Bellingay v. Bellingay & Thomas*, L. R. 1 P. & D. 168.

<sup>2</sup> *Evans v. Evans & Bird*, L. R. 1 P. & D. 36.

In this case the Court ordered that the petitioner should be allowed to deduct from the damages awarded (£300) any surplus costs to which he might have been put beyond those taxed against the co-respondent; the balance of the damages to be paid over to a trustee on behalf of the children, the annual produce, until they came of age, to be expended on their maintenance and education. 35 L. J. P. & M. 84.



## CHAPTER VIII.

### *Settlement of Property to which a Wife is entitled in Possession or Reversion—Marriage Settlements—Costs.*

THE subjects next to be considered are ; first, the power of the Court, when a divorce or judicial separation is decreed by reason of the wife's adultery, to divert from her any property, to which she is entitled in possession or reversion, in favour of the innocent parties ; secondly, Its power to vary marriage settlements in like manner at the suit of either party.

Statutable  
provisions.

By the 45th section of the Divorce Act, in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as It shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.<sup>1</sup>

22 & 23  
Vict. c. 61,  
s. 5.

The Court having held that under the above section, It could not deal with marriage settlements, the power

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<sup>1</sup> The 6th section of 23 & 24 Vict. c. 144, after reciting the above section, enacted that any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law notwithstanding the existence of the disability of coverture at the time of the execution thereof.

of doing so was conferred by the 5th section of 22 & 23 Vict. c. 61, which enacted that the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.<sup>2</sup>

It will be most convenient to state the cases and the construction put upon the above sections in their order.

In *Seatel v. Seatel*,<sup>3</sup> a judicial separation having been decreed on the ground of the wife's adultery, the Court ordered that the trustees, in whom the property to which the wife was entitled was vested, should pay over £80 per Act.

Settlement  
of wife's  
property  
under s. 45  
of Divorce  
Act.

<sup>2</sup> As to the mode of proceeding under the above provisions, see Rules 95, and 97 to 103, and Rule 204, in Appendix.

The petition may be filed as soon as the final decree—that is, in a suit for dissolution of marriage, or for nullity of marriage, the decree absolute—has been pronounced. According to the property to be dealt with, it may be under either or both of the above sections. In form, it should state shortly in separate paragraphs, the proceedings in the cause, the ages of the children, if any, then recite the provisions of the will or settlement material to the case, and conclude with a prayer to the Court according to the alteration desired to be made in such provisions. See Rules 97 to 100. The pleadings, when completed, are in the first instance referred to one of the Registrars, before whom the parties interested attend, and who makes his report accordingly; and the matter is then brought before the Court on motion to confirm or vary the report. See Rules 101, 102. Notice of the motion must be given to the parties interested, whether they have attended before the Registrar or not.

If any suggestion is made that the order does not carry out the intention of the Court, It may, in accordance with the practice of the Court of Chancery, reopen and rehear the matter with the view of doing what justice may require, *Cavendish v. Cavendish & Rochefoucauld*, 38 L. J. P. & M. 13; but It will not review and alter an order for the variation of marriage settlements by reason of any matter arising subsequently to the date of the order. *Gladstone v. Gladstone*, L. R. 1 Prob. Div. 442; 45 L. J. P. D. & A. 82.

<sup>3</sup> 4 S. & T. 230: s.c. as *Seatie v. Seatie*, 30 L. J. P. & M. 216.

annum, a moiety of her income, by the trustees named by the petitioner to be applied to them to the maintenance and education of the children of the marriage.<sup>4</sup>

In *Bacon v. Bacon and Bacon*,<sup>5</sup> it appearing that under the trusts of certain wills, the respondent would be in receipt of one-sixth of an income of £600, arising out of real property, with power to dispose thereof; the Court directed that two-thirds should be settled on the children—two sons and a daughter, aged respectively nine, seven, and five years—immediately, and the remaining third after the mother's death.

In *Carstairs v. Carstairs, Dickenson and others*,<sup>6</sup> the respondent, who was proved to have been guilty of very gross misconduct, and had put the petitioner to great expense by opposing the petition, became entitled in possession after the decree *nisi*, but before it was made absolute, to about £500. The Court, however, declined to deprive her of any portion of the fund in favour of the petitioner, as it was all that she had to live upon.

An interest under a marriage settlement which may never be realized is not property in "reversion" with which the Court can deal under the 45th section of the Divorce Act.<sup>7</sup>

In *Milne v. Milne and Fowler*,<sup>8</sup> the respondent under the will of her father had a life interest to her separate use in certain property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income or any part thereof should

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<sup>4</sup> In this case the Court held that It could not interfere in the power of appointment vested in the wife. Again, in *Davies v. Davies & M'Carthy*, 37 L. J. P. & M. 17, an application under 22 & 23 Vict. c. 61, s. 5, the Court refused to sanction an agreement between the parties whose marriage had been dissolved that the power of appointment given to the respondent in the settlement should be extinguished, and refused to make any order affecting the appointment of trustees.

<sup>5</sup> 2 S. & T. 86.

<sup>6</sup> 3 S. & T. 538.

<sup>7</sup> See *Stone v. Stone & Brownrigg*, 3 S. & T. 372.

<sup>8</sup> L. R. 2 P. & D. 295; 40 L. J. P. & M. 67.

either voluntarily or involuntarily be aliened or incumbered or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, and such annual income was to be applied for the benefit of the respondent or her children at the discretion of the trustees. The Court ordered a settlement to be made out of the respondent's life income derived from her father's will in favour of the petitioner and his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to pay her in case the substituted trust came into operation by reason of such order; holding that such a possibility of income was not property in reversion within the meaning of the statute.

The 5th section of 22 & 23 Vict. c. 61 applies only to settled property, and may be considered as supplementary to, and as a further extension of the powers given by the 45th section of the Divorce Act. Its operation was, however, limited to cases in which there was living issue of the marriage, and the Court held in a series of decisions that It was bound by the proper legal interpretation of the word "parents;" and that as persons cease to be parents when they have no longer living issue, It had no power to make an order with reference to settled property unless there was a child of the marriage living not only at the date of the divorce, but also at the time when the order was applied for.<sup>9</sup>

But now by 41 Vict. c. 19, s. 3, the Court may exercise the powers vested in it by the above provisions

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<sup>9</sup> *Thomas v. Thomas*, 2 S. & T. 89; *Bird v. Bird*, L. R. 1 P. & D. 231; 35 L. J. P. & M. 102; *Corrance v. Corrance & Lowe*, Moore intervening,\* L. R. 1 P. & D. 495; 37 L. J. P. & M. 44; *Graham v. Graham & Griffith*, L. R. 1 P. & D. 711.

\* In this case it was held that the trustees of a settlement cannot be heard in support of an application to alter it, though they may be heard in support of a settlement.

notwithstanding that there are no children of the marriage.

Separation  
deeds.

The Court is disposed to construe the section liberally, and holds that any deed—such as a separation deed<sup>1</sup>—whereby property is settled upon a woman in her character as a wife, and to be paid to her while she continues a wife, comes within its scope, and may be dealt with as a settlement.<sup>2</sup>

Principles  
on which  
the Court  
acts.

As marriage settlements—whether ante-nuptial or post-nuptial—are generally executed for the benefit of the wife; applications respecting them most frequently arise out of suits instituted by the husband. But, whether the wife or the husband be the respondent in the cause, the Court will act upon the same principles in dealing with the settlements. It will endeavour to place the innocent party, as far as is practicable, in the same pecuniary position as before the marriage was dissolved. It will take into consideration the conduct of the parties, their pecuniary position and that of the children, and the change effected in it by the divorce; and, having regard to all the circumstances disclosed, will make such orders as may seem most beneficial to the innocent parties by diverting the trusts of the settlement in their favour—in some cases, treating the respondent as if naturally dead,<sup>3</sup> in others, by ordering the trustees to

<sup>1</sup> *Stone v. Stone & Brownrigg*, 3 S. & T. 372; 33 L. J. P. & M. 95. But, in this case, as the separation deed contained a stipulation that, in the case of a dissolution of the marriage, the trusts under it should be null and void, the Court made no order, as there was no settlement to deal with.

<sup>2</sup> *Worsley v. Worsley & Wignall*, L. R. 1 P. & D. 648; 38 L. J. P. & M. 43. In this case, the deed which the Court was asked to remodel was an ordinary deed of separation, under which the petitioner covenanted to pay the respondent £200 a year during their joint lives, to be reduced to £150 for the remainder of her life if she survived him, or £50 a year only if she married again. The Court made an order embodying the petitioner's proposal to reduce the £200 per annum by one-third and the other sums by one-half, the order to be submitted to the parties after it was drawn up, so that they might make any objection to it if so advised.

<sup>3</sup> *Gill v. Gill & Hogg*; *Stone v. Stone & Brownrigg*, 3 S. & T. 359, 372.

apply the whole or a proportion of the respondent's life interest for the benefit of the petitioner, or of the children, or both,<sup>4</sup> according to the sources whence the income is derived—consistently, however, with not leaving the respondent entirely without means.

In *Callwell v. Callwell & Kennedy*,<sup>5</sup> the Court declined to interfere with the respondent's life-estate in the interest of a sum of about £1384, to which she was entitled after the death of her father, and which was, after her death, settled upon the petitioner absolutely; but with respect to an annuity of £400, which the petitioner had, by the settlement, covenanted to pay to his wife for life in the event of her surviving him, ordered that the trustees should apply all moneys so received by them under the covenant to the maintenance and education of the children of the petitioner and the respondent born previously to the separation.

In *Bullock v. Bullock and Strong*,<sup>6</sup> by a post-nuptial settlement certain property belonging to the respondent was assigned to trustees in trust, amongst other things, to pay the interest and annual proceeds thereof to her for her separate use. Subsequently a deed of separation was entered into between the parties with the same

<sup>4</sup> *March v. March & Palumbo*, L. R. 1 P. & D. 440; 36 L. J. P. & M. 28.

But the settlement can be varied only "for the benefit of the children of the marriage or of their parents." In *Sykes v. Sykes & Smith*, L. R. 2 P. & D. 163; 39 L. J. P. & M. 52, the petitioner's father having covenanted to pay the respondent after the petitioner's death an annuity of £100 during the joint lives of himself and the respondent, an order was made that, after the petitioner's death, the annuity should be applied for the benefit of the only child of the marriage; but the Court held that It had no power to deprive the respondent of the annuity in the event of her surviving the child.

For the same reason, the Court has no power so to vary a marriage settlement as to deprive an infant child of the marriage of an interest secured to it by such settlement. *Crisp v. Crisp*, L. R. 2 P. & D. 426; 42 L. J. P. & M. 13.

<sup>5</sup> 3 S. & T. 259.

<sup>6</sup> L. R. 2 P. & D. 389; 41 L. J. P. & M. 83.

trustees as those of the post-nuptial settlement. By this deed the petitioner covenanted to pay the respondent an annuity for her life. The Court ordered that whenever any money should be payable to the respondent under the deed of separation, the trustees should, out of the moneys in their hands payable to the respondent under the post-nuptial settlement, pay and apply a sum equal in amount upon such and the same trusts as would be applicable thereto in case the respondent were dead and had died in the lifetime of the petitioner.

When the alteration of a settlement is applied for in favour of a child in the custody of the father, the Court may require full information of the father's means. In *Webster v. Webster and Mitford*,<sup>7</sup> the petitioner had no property except £500, realized by the sale of his commission as a lieutenant in the army: the respondent was entitled to a life-interest in about £2,900 Consols, which sum she had brought into settlement. The Court ordered £20 a year to be paid by the trustees of the settlement during the respondent's life out of the dividends received by them on the settled property, to the paternal grandfather for the benefit of the child.

The Court will not, at the prayer of the wife who has been found guilty of adultery, deprive the husband of the benefit he takes under a settlement, whether for the benefit of the children or not.

In *Thompson v. Thompson and Barras*,<sup>8</sup> it appeared that Mrs. Thompson had become entitled in 1859, to a life-interest in certain hereditaments, with remainder to her children. As this interest was not secured to her separate use, her husband the petitioner became entitled during their joint lives, *jure mariti*. For some years previously the parties had been living separately, and after some negotiation, a deed of settlement was made in

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<sup>7</sup> 3 S. & T. 106; 32 L. J. P. & M. 29.

<sup>8</sup> 2 S. & T. 649; 32 L. J. P. & M. 39.

1860, by which the property was conveyed to trustees, on trust to pay, during their joint lives, one half of the proceeds to Thompson, and the other moiety to Mrs. Thompson, "until the said Mary Ann Thompson shall commit any act of adultery, and the trustees for the time being acting in the trusts, &c. shall declare by writing under their hands that they have received evidence thereof," &c. from and after which time the trustees to pay Mrs. Thompson's moiety to Elizabeth, the daughter of the parties. The trustees had acted upon this provision, and given notice that they intended to pay Mrs. Thompson's moiety to the daughter, who it appeared had refused her father's offer of a home, and continued to live with her mother and Barras. The Court refused to make an order that the moiety payable to the petitioner should be applied to the use and benefit of the daughter.

On the other hand, where the petitioner has but a small income, and the respondent is a woman of considerable fortune, the Court will, in dealing with the settlement, be disposed to allot to the petitioner such a portion of her settled property as would place him in a position somewhat equivalent to that he would have occupied had the married status of the parties continued. The amount so to be allowed must, in each case, be a matter of discretion; but the principles on which the Court will act were clearly stated by the Judge Ordinary in *March v. March and Palumbo*.<sup>9</sup> "The first consideration will be: what is the nature and extent of the pecuniary change operated by the wife's criminality? The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had been a binding union, and the parties had lived in harmony together upon their joint incomes. If this

Alteration  
in favour  
of peti-  
tioner.

<sup>9</sup> L. R. 1 P. & D. p. 442; 36 L. J. P. & M. p. 29.



union has been broken and the common home has been abandoned by the criminality of the one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage-vow, be wholly deprived of means, to the scale of which he may have learnt to accommodate his mode of life; nor, viewing the matter on the other side, does it seem either just or equitable that funds which were intended at the time of the marriage for the use of both should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman."<sup>1</sup>

In this case the joint annual income of the parties amounted to £1718—£260 being derived from the petitioner's official appointment, £1458 from property brought into settlement by the respondent, or bequeathed to her separate use by her mother. The Judge Ordinary ordered to be paid out of the income of the respondent's settled property £200 per annum to the petitioner during the minority of the son of the marriage for his maintenance and education, and on his attaining his majority, to the son himself; and £440 per annum to the petitioner during the joint lives of himself and the respondent.

On appeal from this order, the full Court held that

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<sup>1</sup> This was, however, inevitably the consequence of the Court being unable to deal with the settlement where there was no issue of the marriage: so that a woman, towards whom the co-respondent might have been attracted chiefly by her marriage settlement, was enabled after her marriage had been dissolved on account of her adultery, to share with the partner of her guilt, funds brought into settlement wholly by her husband. This in justice has now been remedied by the 3rd section of the Matrimonial Causes Act, 1878, above set out, *ante*, p. 219.

where an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody; that the fact that the original order did not give such a direction was not a ground of appeal, as the Judge Ordinary would have so framed it had he been applied to for that purpose at the time it was made; and that he had, in making the allowance, exercised his discretion on right principles and in an equitable manner.

Again in *Benyon v. Benyon and O'Callaghan*,<sup>2</sup> the respondent had an income of about £1350 per annum; the petitioner had only £200 per annum. Some time previously to the suit for dissolution of marriage, the parties had agreed to live apart under a deed of separation, by which the petitioner was to have an allowance of £100 per annum. The Court, acting on the principle that where the wife is in the enjoyment of a substantial income, a sufficient maintenance ought to be allotted to the husband, allowed him out of the respondent's income, £300 per annum for life; and ordered that he should be relieved from a covenant to appoint in favour of his wife contained in the settlement; also, that he should be paid £100 per annum for the maintenance of the child until he should attain the age of twenty-one: the annuity then to be payable to the child.

The order is not retrospective, and therefore the alteration in the destination of the settled property takes effect only from the date of the order. In *Paul v. Paul and Farquhar*,<sup>3</sup> the father of the respondent had settled property in the first place for the benefit of his daughter for life, then for the benefit of the husband, and on the death of the survivor, for the benefit of the children. The marriage having been dissolved, and the respondent having since married the co-respondent, the Court varied

Order not  
retrospec-  
tive.

<sup>2</sup> L. R. 1 Prob. Div. 447; 45 L. J. P. D. & A. 93.

<sup>3</sup> L. R. 2 P. & D. 93; 39 L. J. P. & M. 50.

the settlement by ordering the whole income of the settled property to be applied during the joint lives of the petitioner and respondent for the benefit of the children: but held that It had no authority to alter the destination of dividends due and payable before the date of the order.

The Court will not exercise Its power of dealing with settlements merely for a collateral purpose. In *Symonds v. Symonds and Harrison*,<sup>4</sup> the respondent, under cover of an order of the Court for access to her child, took possession of it, and removed it beyond the jurisdiction of the Court. On an application to vary the settlement made on the marriage of the parties, the Court refused to make any order relating to the property settled on behalf of the respondent, merely for the purpose of compelling her to submit to the authority of the Court, and to restore the child to the custody of the petitioner.

When  
marriage  
dissolved  
at suit of  
wife.

When the marriage is dissolved by reason of the husband's misconduct, the Court will deprive him of any interest he may take in the income of the wife's money under the settlement. In *Boynton v. Boynton*,<sup>5</sup> it appeared that the husband had eloped with the petitioner when a minor, she being entitled under the will of her father to about £19,000 stock; and that by a post-nuptial settlement, two-thirds of the income of her property were settled to her use for life, one-third to her husband, with benefit of survivorship respectively, and after the death of the survivor, for the children. The Court directed that, till further order, what would be paid to him should be paid to the mother—to whom It gave the custody of the child—and in the event of his surviving her, the whole to the child.

In *Chetwynd v. Chetwynd*,<sup>6</sup> the Court having estimated the total income of the husband at £1159—part of it

<sup>4</sup> L. R. 2 P. & D. 447.

<sup>5</sup> 2 S. & T. 275.

<sup>6</sup> L. R. 1 P. & D. 39; 35 L. J. P. & M. 21.

being derived from settled property to which the wife had contributed £3000—ordered that £200 a year should be paid out of the settled property to the persons who were intrusted with the custody of the children of the marriage, for their maintenance and education; and taking into consideration the fact that the wife was not free from blame, and that she had contracted debts to the amount of about £3000 previously to the separation, which the husband was liable to pay, and also the expense he had incurred by reason of the suit for dissolution, further ordered that £250 a year out of the settled property should be paid, during the respondent's life, to the petitioner, *dum sola et casta vixerit*.<sup>7</sup>

In *Maudslay v. Maudslay*,<sup>8</sup> the marriage had been dissolved at the suit of the wife. There were three children of the marriage, boys, aged respectively, six, five, and three years. Three sums of £10,000 had been brought into settlement—£10,000 by the wife, £10,000 by the husband, and a further sum of £10,000, to which the respondent would become entitled on his mother's death. The Court directed that the settlement should be varied as to the £10,000 brought into settlement by the wife, by extinguishing absolutely the interest and powers of the respondent with regard to it, and by authorizing the petitioner to enjoy and deal with it as though the respondent were dead. As to the £10,000 in possession brought into settlement by the respondent, the Court declined to make any variation, being of opinion that it ought not to deprive him of the power of exercising parental judgment and discrimination with regard to his boys, or that the relations of the children with their

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<sup>7</sup> But where the effect of the order is only to deprive the husband of his interest in the wife's fortune, and to put the innocent wife into immediate possession of her own income, the Court will not impose the condition that she shall enjoy such property only *dum sola et casta vixerit*. See *Gladstone v. Gladstone*, L. R. 1 Prob. Div. 442; 45 L. J. P. D. & A. 82.

<sup>8</sup> L. R. 2 Prob. Div. 256.

father should be changed to any greater extent than was inevitable from their remaining in the custody of their mother. The Court declined to vary certain other powers vested in the respondent, holding that however culpable his conduct had been, Its functions were not to punish him for it, but merely to prevent, as far as was just and practicable, the petitioner being damaged in a pecuniary sense, by the dissolution of the marriage; but on the other hand, It deprived him of the power of taking from the petitioner her life interest in the £10,000 in reversion in the event of her surviving him. The Court also varied the provisions of the settlement as to the appointment of new trustees.

After  
death of  
petitioner.

As the authority of the Court to deal with settlements does not arise till after the final decree, if the petitioner dies before the decree can be made absolute, the suit abates, and no other person can intervene to get the decree made absolute;<sup>9</sup> but, if the petitioner dies after the decree has been made absolute, the guardian of the children may then present a petition for an order to vary the trusts of the settlement.<sup>1</sup>

In *Smithe v. Smithe and Roupell*,<sup>2</sup> the petitioner, who died after the decree dissolving his marriage had been made absolute, had by his will excluded some of his children from participation in certain property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate. The Court, in dealing with the settlement, extinguished the respondent's life-interest in her husband's property, but refused to compel her, out of her separate income and estate, which

<sup>9</sup> *Grant v. Grant & others*, 2 S. & T. 522; 31 L. J. P. & M. 174.

<sup>1</sup> *Ling v. Ling & Croker*, 4 S. & T. 99; 34 L. J. P. & M. 52.

<sup>2</sup> L. R. 1 P. & D. 587.

It was, in this case, decided that an executor of a deceased petitioner cannot, as such, petition for an alteration of the settlements, and that the guardian of the minor children is the proper person to do so.

was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children.

The costs of an application to vary a marriage settlement may be thrown on either of the parties according to the circumstances of the case.

In *Bird v. Bird*,<sup>3</sup> the wife's suit, the Court directed her costs to be paid by the respondent, as it was a fair question for argument, but made no order as to the costs of the trustees; and again in *Corrance v. Corrance and Lowe*,<sup>4</sup> the full Court being of opinion that the question was a proper one to be argued, made no order as to costs; but in *Graham v. Graham and Griffith*,<sup>5</sup> the petition was dismissed with costs.

In *Boynton v. Boynton*,<sup>6</sup> the wife's suit, the Court made no order as to the costs, as she had the whole income.

In *Ling v. Ling and Croker*,<sup>7</sup> the guardian was held entitled to his costs of the petition.

A co-respondent, when condemned in costs, is liable to the costs of altering a settlement, as such alteration is a consequence of his misconduct;<sup>8</sup> but if part of an application to deal with settlements is granted, and part fails, the costs of that part which fails will not be cast upon him, if they can be separated from the successful part.<sup>9</sup>

In *Smithe v. Smithe and Roupell*,<sup>1</sup> the costs of the petitioner and trustees were ordered to be paid by the co-respondent.

<sup>3</sup> L. R. 1 P. & D. 231; 35 L. J. P. & M. 102.

<sup>4</sup> L. R. 1 P. & D. 495; 37 L. J. P. & M. 44.

<sup>5</sup> L. R. 1 P. & D. 711.

<sup>6</sup> 2 S. & T. 275.

<sup>7</sup> 4 S. & T. 99; 34 L. J. P. & M. 52.

<sup>8</sup> *Gill v. Gill & Hogg*, 3 S. & T. 359.

<sup>9</sup> *Stone v. Stone & Brownrigg*, 3 S. & T. 372.

<sup>1</sup> L. R. 1 P. & D. 587.

## CHAPTER IX.

### *Custody of Children—Custody of, or Access to Children pending the Suit: On final Decree: After final Decree—Intervention by third persons.*

Statutable  
provisions.

By the 35th section of the Divorce Act, In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree,<sup>1</sup> make such interim orders, and may make such provision in the final decree as It may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.<sup>2</sup>

By the terms of this section, the Court had no power to modify an order made on the final decree, and, therefore, in some cases declined to make any order;<sup>3</sup> but, now, by the 4th section of 22 & 23 Vict. c. 61, The Court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may, upon application, by petition, for this purpose make, from time to time, all such orders and provision with respect to the

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<sup>1</sup> See Rule 104 in Appendix.

<sup>2</sup> The Court has no power to make any order respecting the custody of the children in a suit of restitution of conjugal rights. *Chambers v. Chambers*, 39 L. J. P. & M. 56.

<sup>3</sup> As in *Robotham v. Robotham*, 1 S. & T. 190, where the children were with the mother, the petitioner; and the father was in America.

custody, maintenance and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending.<sup>4</sup>

Under the above provisions, the Court possesses very extensive discretionary powers, exceeding those exercised by the Courts of Law and Equity, with respect to the custody, maintenance, and education of the children of the parties whose marriage is the subject of a suit for judicial separation, dissolution of, or nullity of marriage, as well during the pendency of the suit, as after the final decree; and may from time to time vary its orders respecting them as circumstances may require. Its jurisdiction over them is limited to the period at which the parents' right to control ceases, which has been fixed by Court of Queen's Bench at the age of sixteen years.<sup>5</sup>

First: As to the custody of or access to the children pending the suit.

The application must be made on motion to the Court founded on the affidavits of the parties, or of their relatives or friends in whose custody the children are, or in whose custody it may be desired to place them; but the Court will not do anything tending to prejudice the

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<sup>4</sup> See Rule 195 in Appendix.

In suits for dissolution of marriage, orders respecting the children between the decree *nisi* and the decree absolute are interim orders.

When the permanent custody of the children is intended to be asked for on the final decree, or on a decree of judicial separation, a prayer to that effect should be embodied in the prayer of the petition. *Seymour v. Seymour*, 1 S. & T. 332.

An application after the final decree must be by a separate petition.

<sup>5</sup> *The Queen v. Howes*, 30 L. J. (M. C.) 47. On this authority, the Judge Ordinary, in the case of *Mallinson v. Mallinson*, L. R. 1 P. & D. 221; 35 L. J. P. & M. 84, ruled as stated in the text; but until this decision, no order had been made by the Court of Divorce as to the custody of a child above the age of fourteen.



main issues in the suit, and therefore will not allow affidavits to be read touching the truth or falsehood of the charges brought by the parties against each other.<sup>6</sup> It will consider only the circumstances of the application before it—the ages of the children, their position in relation to other members of the family—and in its discretion, will make such orders as may appear to be most convenient to all the parties concerned, and above all, most conducive to the welfare of the children. Where they appear to be in proper custody—as, for instance, at a good school in England or abroad, or under the care of a relative friendly to both parties<sup>7</sup>—the Court will be very reluctant to disturb them; but as It has power to make an order for access only,<sup>8</sup> It will, according to the circumstances, gratify the natural affection of the parents for their children by allowing either party, as the case may be, to have reasonable access, provided that such access would not be productive of injury to them. The leading principle, however, upon which the Court acts is the welfare of the children, rather than the indulgence of the parents.<sup>9</sup> The access allowed is usually once a week or

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<sup>6</sup> *Ryder v. Ryder*, 2 S. & T. 225.

<sup>7</sup> In *Curtis v. Curtis*, 1 S. & T. 75; 27 L. J. P. & M. 16, the wife's suit on the ground of her husband's cruelty, the Court ordered that the two elder children, aged nine and eight years respectively, should remain in the custody they were then in—that of an old governess of the family—the youngest child, aged five years, to remain with the mother; in both cases, the father to have reasonable access, and their residence not to be changed without giving him notice.

In *Boynton v. Boynton*, 1 S. & T. 324, the wife left her husband's house, with the view of instituting a suit for dissolution on the grounds of his adultery and cruelty, taking with her their boy, between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On an application for an interim order to prevent the father removing him from the school, the Court ordered the child to be given up to the husband's mother, who from her letters appeared to be on good terms with her daughter-in-law, and attached to the boy.

<sup>8</sup> *Thompson v. Thompson & Sturmshells*, 2 S. & T. 402.

<sup>9</sup> In *Philip v. Philip*, 41 L. J. P. & M. 89, where the Court was satisfied

once a fortnight, sometimes with the condition that the visit shall be in the presence of some third person.

The father is, *primâ facie*, entitled at common law to the custody of his child, however young,<sup>1</sup> and the Court will exercise its discretionary power with reference to that right, and will adhere to, or depart from, the common law rule according to the circumstances of the case.<sup>2</sup> The father's right.

In *Carlidge v. Carlidge*,<sup>3</sup> the wife, petitioner in a suit for judicial separation, had departed from her husband's house, leaving her child, seven months old, behind her. Application being made on the part of the mother to have the child given up to her, it appeared from the affidavits that the child was as healthy and as thriving as when the mother was with it, and there was no proof that the mother's health was injured, or that she was capable of suckling it. The Court rejected the motion, but only on condition of an undertaking being given by the husband not to remove the child without the sanction of the Court; the mother to have reasonable access to it.

But in *Barnes v. Barnes* and *Beaumont*,<sup>4</sup> the mother, respondent in a suit for dissolution of marriage, was allowed to have the custody of her two infant children—the one between three and four years of age, the other eighteen months—on the ground that she was suffering in her health from being deprived of their society, and

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that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, It refused the mother an order for access, even though there was reason to apprehend that the separation might exercise a prejudicial effect on the mother's health.

<sup>1</sup> *The Queen v. Clarke*, 7 Ell. & Bl. 186.

<sup>2</sup> In *Spratt v. Spratt*, 1 S. & T. 215, where it appeared from the affidavit of the husband that the mother was leading an abandoned life, the Court ordered that the elder child, aged seven years, should be delivered to the father; the younger child, aged four years—as there was no fear of its being contaminated by the alleged conduct of the mother—to remain with her friends, she undertaking not to remove it.

<sup>3</sup> 2 S. & T. 567; 31 L. J. P. & M. 85.

<sup>4</sup> L. R. 1 P. & D. 463.

that they were living with a stranger, and not with the father.

No actual  
right of  
access.

The wife has not an actual right to an order for access to her children, and where such access would be incompatible with the convenience of the parties, or would be productive of injury to the children, or where the application appears not to be made *bonâ fide*, the Court may refuse to make any order; as in *Codrington v. Codrington* and *Anderson*,<sup>5</sup> where the father having removed his two children—girls, aged respectively about twelve and eleven years—from their mother's custody, instituted a suit for dissolution of marriage, and then took the children with him to Gibraltar. The mother contented herself for some months with an arrangement into which she had entered with the petitioner's solicitor for corresponding with her children; and then moved for an order for access to them—substantially, for an order on the father to bring or send them to England. Under the circumstances, the full Court, on appeal, confirmed the refusal of the Judge Ordinary to make any order.

Orders on  
final  
decree.

Although, as I have stated, the Court will not, by its *interim* orders respecting the children, prejudice the merits of the cause; It will, in its order made on the final decree, take into consideration all the circumstances of the particular case before it, the circumstances of the misconduct which has led to the separation, the merits and demerits of the parents as disclosed at the hearing; and above all, the Court will look to the interest of the children, and will give the custody of them—having regard to their ages, and subject to further orders—to the parent who seems best qualified to take charge of, and maintain them.<sup>6</sup>

Therefore, although it seems desirable that the custody of girls should be given to the mother, and that boys

<sup>5</sup> 3 S. & T. 496.

<sup>6</sup> See *Symington v. Symington*, L. R. 2 Sc. and Div. App. 415.

should be left in the custody of the father, who is *primâ facie*, their natural guardian, and on whom, their moral and material interest must mainly depend ; yet where the wife is the successful suitor, and is free from blame, she is generally held entitled to have the charge of her children, partly for their benefit, and partly on the ground that she ought not to obtain her decree at the expense of losing the solace of their society.<sup>7</sup>

In *Marsh v. Marsh*,<sup>8</sup> the Court, in pronouncing a decree of judicial separation at the suit of the wife on the ground of the husband's cruelty, was of opinion that, although it did not appear that he was ever guilty of any cruelty or unkindness to his children,—a girl aged seven, a boy aged four, and two girls younger—it was just and proper that they should remain in the custody and under the control of their mother so long as she had the means of giving them a suitable education and the inclination to do so. “I therefore make it part of my decree that the children shall remain in the custody and under the control of their mother until the age of fourteen, provided she keeps and maintains at school such of them as are of a fit age to be sent there, without subjecting her husband to expense. The husband always to have information of the schools at which they are placed, and to have the same access to them there as is allowed to the parents of other children at the same schools. As long as any one of them is kept by its mother at her home, as being too young to be sent to school, the respondent to have access to it there once a week at any reasonable hour.”

Decision  
of Sir C.  
Cresswell.

In *Suggate v. Suggate*,<sup>9</sup> where it appeared that the

<sup>7</sup> But, for this reason, the Court declined to interfere with the custody of an *idiot* boy, aged twelve years, and refused to order him to be delivered up to the mother, holding that it was a question more properly belonging to the Court of Chancery. *Cooke v. Cooke*, 3 S. & T. 248.

<sup>8</sup> 1 S. & T. p. 316.

<sup>9</sup> 1 S. & T. p. 496.

respondent, in addition to the cruelty of which he had been found guilty towards his wife, was a man of immoral habits, the Court ordered that the children—three sons, aged respectively nine, six, and two, and one daughter aged four years—should be kept in the custody of the mother until they respectively attained the age of fourteen years; the father to be kept informed from time to time of the places where the children were residing, and to have access to them once a week for two hours between 10 a.m. and 4 p.m., in the presence of some person to be appointed for that purpose by the petitioner.

In *Boynton v. Boynton*,<sup>1</sup> on a decree of dissolution on the grounds of the husband's adultery and cruelty, the Court held that it would not be just to leave the custody of the child—a boy, about ten years of age—in the father, as the marriage had been dissolved by reason of his misconduct, the wife not having been to blame, and therefore directed that the mother should have the custody of the child till further order, with provision for reasonable access by the father; the child not to be taken out of the jurisdiction of the Court without leave.

Order for  
main-  
tenance.

In some cases, the Court will make an order upon the husband for the maintenance only of the children.

In *Milford v. Milford*,<sup>2</sup> the wife having obtained a judicial separation on the ground of her husband's adultery, and also the custody of their two children (girls) until the Court should otherwise direct, presented a further petition praying the Court to order the respondent to pay her a sum or sums of money for the past and future maintenance of the children. The respondent, in answer, asked the Court to order the children to be delivered up to his father and sister, who were prepared to provide for their maintenance and education. The Court refused to take the children from the custody of

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<sup>1</sup> 2 S. & T. 275; 30 L. J. P. & M. 156.

<sup>2</sup> L. R. 1 P. & D. 715; 38 L. J. P. & M. 63.

their mother, who appeared to have been wholly blameless, and made an order on the respondent to contribute a certain sum per annum towards their maintenance.

It may unfortunately happen that neither parent is fit to be intrusted with the custody of the children: in such cases, the Court has construed liberally the obvious intention of the Legislature that It should have the power to make such orders as it may deem "just and proper" for the benefit of the children themselves; and with this view, the Court will not merely decide on the rival claims of the parents, but will entertain the application of third parties who may think proper to intervene and ask for the custody of the children. Such intervention must be in the form of a petition, supported by affidavits of the facts on which it is based.

Intervention by third persons.

In *Chetwynd v. Chetwynd*,<sup>3</sup> the decree for the dissolution of the marriage by reason of the husband's adultery and cruelty having been made absolute, the petitioner filed a petition for an order as to the custody, maintenance, and education of the two children—a girl nearly ten, and a boy about eight years of age—to which the father answered, praying leave to retain their custody. A motion was then made and granted on behalf of the uncle and aunt of the children to be allowed to intervene for their benefit. The Court being of opinion that neither the mother nor the father were, according to the evidence given at the hearing of the cause,<sup>4</sup> fit to be intrusted with the care and custody of the children, committed them to the care of the interveners: the parents to have free access to them at proper times.

On the same principle, the Court will allow an intervention by a third person for the interest of the children, after a decree of judicial separation.

<sup>3</sup> 4 S. & T. 151; 34 L. J. P. & M. 130; L. R. 1 P. & D. 32.

<sup>4</sup> See the judgment of Lord Penzance, L. R. 1 P. & D. p. 42; 35 L. J. P. & M. 21.

In *Godrich v. Godrich*,<sup>5</sup> the wife having obtained a decree on the ground of her husband's cruelty, and the two children having been delivered to her in compliance with an order of the Court; on an application by the father of the respondent to vary that order by reason of certain circumstances in the conduct of Mrs. Godrich, the Court gave him the custody of the younger child.

Where the husband is petitioner. Even after a decree of dissolution at the suit of the husband, the Court might interfere at the instance of intervening relatives, and hold a father disqualified to have the custody of his child if he were shown to be leading a notoriously dissolute life.

But where a husband has obtained a decree dissolving his marriage, and is living and associating with respectable people, and leading to all outward appearance a respectable life; the Court will regard with great disfavour an attempt to get up a charge of adultery against him—with the view of depriving him of the custody of his child—by tracking him about from place to place in order to detect him in an occasional visit to a woman for an alleged immoral purpose.<sup>6</sup>

Where the wife is found guilty of adultery. By the 4th section of 2 & 3 Vict. c. 54, which empowers the Lord Chancellor or the Master of the Rolls to order that a mother may have access to infant children, and if such children be within the age of seven years, to order that they be delivered to and remain in her custody until attaining such age, it is enacted, That no order shall be made by virtue of this Act, whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant or access to any infant, anything herein contained to the contrary notwithstanding.

<sup>5</sup> L. R. 3 P. & D. 134; 43 L. J. P. & M. 2.

<sup>6</sup> *March v. March & Palumbo*, L. R. 1 P. & D. 437.

Where, therefore, a decree has been pronounced at the suit of the husband on the ground of his wife's adultery, the Court will decline to make an order for her to have access to, or custody of the children of the marriage;<sup>7</sup> but will order her to deliver up the custody of a child, rather than leave the husband to the expense of establishing his right as father at common law.<sup>8</sup>

The costs of applications respecting the custody of, and Costs. access to children, may, like other costs, devolve upon either of the parties; but will not be taxed against the husband when made unnecessarily.<sup>9</sup>

Persons who intervene between the parents for the purpose of interfering with the custody of their children must take the risk of being condemned in the costs, should their intervention prove unsuccessful.<sup>1</sup>

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<sup>7</sup> *Clout v. Clout & Hollebone*; *Bent v. Bent & Footman*, 2 S. & T. 391, 392; 30 L. J. P. & M. 175, 176.

<sup>8</sup> *Boyd v. Boyd & Collins*, 1 S. & T. 562.

<sup>9</sup> *Boynton v. Boynton*, 2 S. & T. p. 277, where no order was made as to costs, the wife having all the income.—*Thompson v. Thompson & Sturmjells*, 2 S. & T. 402, where the wife's costs of appeal to the full Court for access only were ordered not to be taxed against the husband. In *Bacon v. Bacon*, L. R. 1 P. & D. 167, a judicial separation having been decreed on the ground of the wife's cruelty; she afterwards applied on motion for access to some of the children, and an order for access was made; but the Court would not allow the costs of the motion to be taxed against the husband, as he had not refused her access to the children since the date of the decree.

<sup>1</sup> *March v. March & Palumbo*, L. R. 1 P. & D. 437.



## CHAPTER X.

*Petition for Reversal of Decree of Judicial Separation—  
New Trial—Appeals to Full Court ; to Court of Appeal ;  
to House of Lords—Liberty to Parties to marry again.*

**Reversal of  
decree of  
separation.** BY the 23rd section of the Divorce Act, it is enacted that Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree ; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.<sup>1</sup>

The obscure meaning of the above section was illustrated by the argument to which it gave rise in the

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<sup>1</sup> For the procedure under this section, see Rules 63 to 66, and Form, No. 10, in Appendix. For the position of a wife as a *feme sole* after a decree of judicial separation, with respect to property acquired by her, and for the purposes of contract and suing or being sued, and her relation to other persons, see ss. 25, 26 of the Divorce Act, 20 & 21 Vict. c. 85, and ss. 7, 8, 10 of 21 & 22 Vict. c. 108.

case of *Phillips v. Phillips*,<sup>2</sup> in which case the husband had been personally served with the petition and citation at the suit of his wife on the ground of cruelty, but he did not enter an appearance nor did he appear at the hearing, and a judicial separation was decreed. A few months afterwards, the husband filed a petition for the reversal of the decree, in which he set out the circumstances under which it had been made in his unavoidable "absence;" traversed the charges in the original petition, and alleged facts tending to show that the separation between his wife and himself had not been caused by any misconduct on his part. The wife in her answer demurred to the petition and traversed it: and by the direction of the Judge Ordinary, the demurrer was argued before the full Court.

The Court held that the word "absence" does not mean absence without knowledge or notice of the suit, but the non-appearance of the respondent; and that the only construction which can be put on the section is, that where the respondent has not in fact appeared, he may present a petition under this section; that in his petition he must state the reasons of his absence, and the ground on which he asks to be relieved from the results of it; in other words, he must state how it happened that the decree was obtained in his absence, and he must explain the circumstances that gave rise to his absence; and that he must further state circumstances calculated to satisfy the Court that the decree was wrong. The Court may then, upon a review of all the matters alleged and proved, proceed to reverse or affirm the decree, but in coming to a decision, It will be at liberty to consider how far the absence of the petitioner was his own fault or was excusable, and whether he has taken reasonably prompt steps for his relief.<sup>3</sup>

Construction put on the section.

<sup>2</sup> L. R. 1 P. & D. 169; 35 L. J. P. & M. 70.

<sup>3</sup> The other members of the Court concurred with the Judge Ordinary

NEW TRIAL.<sup>4</sup>

Grounds  
for.

The principal grounds on which a new trial of a cause heard before a jury may be applied for are, misdirection; improper rejection or reception of evidence, or that the verdict was against the weight of evidence; and surprise. The latter are the more usual grounds, and as the propriety of granting or refusing a new trial must depend upon the facts and merits of each case, it will be useful only to state the principles which the Court has laid down for its guidance.

Reasons  
for  
granting  
or  
refusing.

The presumption is always in favour of the verdict, and unless it appears that the jury were actuated by passion, prejudice, or mistake, and improperly received or rejected any evidence, the Court is very unwilling to set

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in this construction, and held that although the petition did not allege that the petitioner was absent without citation, he was absent for all the purposes of the suit; and that the petition was good on demurrer.

<sup>4</sup> By s. 18 of 21 & 22 Vict. c. 108, enabling the Judge Ordinary to grant a rule *nisi* for a new trial, the rule could only be made absolute by the full Court; but as by s. 1 of 23 and 24 Vict. c. 144, all the powers and authority of the Court were vested in the Judge Ordinary alone, rules for new trials were thenceforth argued before him, and by s. 2 of that Act, "either party dissatisfied with the decision of such Judge sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may within fourteen days after the pronouncing thereof, appeal to the full Court, whose decision shall be final." The Court has no power to extend the time so limited for appealing from its refusal to grant a new trial. *Boulting v. Boulting*, 33 L. J. P. & M. 81.

The application for a new trial may be made within fourteen days after the trial of the cause—see Rule 62 in Appendix—but the same may under circumstances, and by leave of the Court, be extended. With the notice of motion, a case must be filed stating the proceedings had in the cause, the grounds on which the application is founded, and praying that a new trial may be had. Any affidavits which may be necessary should also be filed with the papers for motion.

On appeal from a refusal of the Judge Ordinary to grant a rule, the full Court will look only at the case as it was argued before him, and will not receive any new affidavits. *Hill v. Hill*, 2 S. & T. 407.

it aside. A new trial therefore will not be granted merely because the Judge might have been of a different opinion; he must be able to go further and say that the jury were wrong, and that he is clearly dissatisfied with the verdict.<sup>5</sup>

In cases of cruelty particularly, where the principal evidence is necessarily that of the parties themselves, the Court is very reluctant to disturb the verdict merely because It might have arrived at an opposite conclusion: "It must see its way very plainly and be satisfied with tolerable certainty that there has been error or miscarriage; failing that, It is bound to accept the verdict as correct."<sup>6</sup>

Nor is it any ground for a new trial that further evidence could be produced in confirmation of the case intended to be made at the first trial, more especially, if such evidence could with reasonable diligence have been then produced; unless there has been surprise and the proposed new testimony is in denial of some matter unexpectedly introduced on the other side.<sup>7</sup>

In some cases, the question has been raised as to the propriety of granting a new trial on one issue where a verdict for the petitioner on both issues would be necessary to found the relief prayed.

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<sup>5</sup> See *Miller v. Miller & Hicks*, 2 S. & T. 427; 31 L. J. P. & M. 73; *Gethin v. Gethin*, the Queen's Proctor intervening, 2 S. & T. 560; 31 L. J. P. & M. 57; *Stone v. Stone & Appleton*, 34 L. J. P. & M. 33; *Codrington v. Codrington & Anderson*, 4 S. & T. 63; 34 L. J. P. & M. 60.

<sup>6</sup> *Scott v. Scott*, 3 S. & T. p. 322.

<sup>7</sup> See *Miller v. Miller & Hicks*, 2 S. & T. 427; 31 L. J. P. & M. 73; *Scott v. Scott*, 3 S. & T. 319; 33 L. J. P. & M. 1.

In *Gethin v. Gethin*, 2 S. & T. 560; 31 L. J. P. & M. 57, the Court refused to grant a new trial on the affidavits of two ladies to the effect that, though they had told the truth, it was only a part of what they knew, and that they could prove much more.

But in *Jago v. Jago & Graham*, 3 S. & T. 103, on an affidavit by a witness that she had made a mistake in an important date given in her evidence, the Court granted a new trial, being of opinion that the error, if any, was such as to have disturbed the judgment and misled the mind of the jury.

In *Fitzgerald v. Fitzgerald*,<sup>8</sup> the wife's petition on the grounds of adultery and cruelty, a verdict having been found in favour of the respondent on both issues, the full Court affirmed the refusal of the Judge Ordinary to grant a new trial on the question of adultery only.

Discretion-  
ary bar.

If the jury determine the questions submitted to them in such a manner that the Court can found its decree, the function of the jury is sufficiently discharged. In *Narracott v. Narracott and Hesketh*,<sup>9</sup> the jury were unable to agree with respect to a charge of cruelty made against the petitioner by the co-respondent, but found a verdict for the petitioner on the issue of adultery with damages. The Court refused to grant a new trial, holding that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was a question for the opinion of the Court under the 31st section of the Divorce Act.

Inconsis-  
tent ver-  
dict.

Nor is an inconsistent verdict necessarily a ground for a new trial; unless it be such as to prevent the Court from ascertaining the substantial opinion of the jury.<sup>1</sup>

Jury  
unable to  
agree.

Where a jury are unable to agree on one issue—*e.g.* adultery—but find a verdict for the petitioner on another issue—*e.g.* cruelty—it is not the practice to grant a new trial, but to order the whole matter to be set down again for trial.

In *Godrich v. Godrich*,<sup>2</sup> a suit by the wife for dissolution of marriage on the grounds of adultery and cruelty, the jury found a verdict for the petitioner on the question of cruelty, but were unable to agree to a verdict on that of adultery, and were discharged. The Court refused to

<sup>8</sup> 3 S. & T. 400. See also *Cartledge v. Cartledge*, 3 S. & T. 406; 32 L. J. P. & M. 126.

<sup>9</sup> 3 S. & T. 408; 33 L. J. P. & M. 132.

<sup>1</sup> See *Ellyatt v. Ellyatt, Taylor & Halse*, 3 S. & T. 503; 33 L. J. P. & M. 137, where the jury found adultery, connivance on the part of the petitioner, and assessed damages against the co-respondent at £50. The Court refused to grant a rule for a new trial.

<sup>2</sup> L. R. 2 P. & D. 392; 41 L. J. P. & M. 45.

allow the question of adultery only to be referred to a new jury, but gave the petitioner the alternative, either to serve a rule upon the respondent to show cause why a decree of judicial separation should not be made on the ground of his cruelty, or to set down both questions, the adultery and cruelty, for a second trial.

When a new trial is directed to be before a jury of a cause which has been determined by the Court Itself, such new trial may be confined to the charge which the Court has held to be proved.

In *Lee v. Lee*,<sup>3</sup> the wife charged her husband with cruelty by the communication of venereal disease, and also by personal violence; and the Court found that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for a new trial of the issue found against him was made absolute, on the ground of surprise; but the rehearing, which was directed to be before a common jury, was ordered to be confined to the charge of personal violence.

The question of costs must depend upon all the circumstances of the case.<sup>4</sup>

#### APPEALS.

The right of appeal from a decision of the Judge upon any matter which under the provisions of the Divorce Act he was empowered to hear alone, lies within three Appeal to full Court.

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<sup>3</sup> L. R. 2 P. & D. 409; 41 L. J. P. & M. 85.

<sup>4</sup> See *Nicholson v. Nicholson & Ratcliffe*, 3 S. & T. 214; 33 L. J. P. & M. 114, where the wife obtained a new trial and then produced evidence which satisfied the Court and the jury that the petitioner's case, charging her with adultery, was false, and a verdict was given in her favour: the husband was ordered to pay the costs of both trials.

See also *Stone v. Stone & Appleton*, 34 L. J. P. & M. 33.

months from the pronouncing of such decision<sup>5</sup> to the full Court, whose decision is final.<sup>6</sup>

The full Court has not been affected by the Judicature Acts, and the Court of Appeal established by those Acts has no jurisdiction to entertain Appeals from orders of the President of the Divorce Court granting or refusing rules for new trials, or from orders respecting alimony, or the custody of children; but all such appeals must still be brought to the full Court of Divorce.<sup>7</sup>

To the  
Court of  
Appeal.

Appeals from final decrees in suits for dissolution of marriage and nullity of marriage lie in the first instance to the Court of Appeal established by the Supreme Court of Judicature Act, 1873, and such appeal must be brought within one year from the date of the decree or judgment appealed from.<sup>8</sup>

To the  
House of  
Lords.

From the Court of Appeal, an appeal lies by way of petition to the House of Lords, and such petition of appeal must be presented within one year from the decree appealed from.<sup>9</sup>

Liberty to  
parties to  
marry  
again.

In undefended suits for dissolution of marriage or for nullity of marriage, the petitioner or respondent may marry the day after the decree is made absolute; but if the suit be defended, or if the decree be appealed from, they must wait until the time has elapsed for presenting the appeal, or until the appeal has been heard and dis-

<sup>5</sup> Except on appeal in respect of a new trial.

<sup>6</sup> For the procedure on appeals to the full Court, see Rules 77 to 79, and Form, No. 11 in Appendix.

Whatever may be the subject of the appeal, the facts are taken to be those proved before the Judge, and appearing on his notes, and the appellant has to argue that those facts did not warrant the decision.

<sup>7</sup> See *Westhead v. Westhead & Gordon*, L. R. 2 Prob. Div. 1; 46 L. J. P. D. & A. 32; *Robinson v. Robinson*, L. R. 2 Prob. Div. 77; *Wallis v. Wallis*, L. R. 2 Prob. Div. 141; *Gladstone v. Gladstone*, L. R. 2 Prob. Div. 143.

And see the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 19; and the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, s. 20.

<sup>8</sup> 36 & 37 Vict. c. 66, s. 19; order 58, rule 15.

<sup>9</sup> 39 & 40 Vict. c. 59, ss. 3, 4. Standing order, No. 1.

posed of. Under the above provisions of the Judicature Acts, they may possibly have to wait at least two years.<sup>1</sup>

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<sup>1</sup> By the 57th section of the Divorce Act, it is provided that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person : and by s. 58, Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

These sections were extorted as a concession to the theological scruples of certain clerical opponents of the Act.



## CHAPTER XI.

### *Procedure under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93.*<sup>1</sup>

By the 4th section of the Legitimacy Declaration Act,<sup>2</sup> all the provisions of the Divorce Act, so far as the same may be applicable, are extended to applications and proceedings under this Act, by the 1st section of which it is enacted that

Applica-  
tion for  
declaration  
of legiti-  
macy or  
validity or  
invalidity  
of mar-  
riage.

Any natural born subject of the Queen or any person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application

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<sup>1</sup> This Act has not, as yet, been the subject of much judicial interpretation.

<sup>2</sup> Which, by the 11th section, is to be construed as one with the Divorce Act.

and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just :

And by the 2nd section, that

Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural born subject of her Majesty, and the said Court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition ; and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon her Majesty and all persons whomsoever.<sup>3</sup>

Application for declaration of right to be deemed a natural born subject.

By the 6th section, a copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing

Attorney-General must be respondent.

<sup>3</sup> For a form of petition, see *Shedden v. Patrick*, 2 S. & T. 170 ; 30 L. J. P. & M. 229.

By s. 3, every petition shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the Court may by any general rule direct. No rules specially applicable to the Act have been framed, but the rules and regulations in the Appendix are, by Rule 174, so far as the same may be applicable, to extend to applications and proceedings under this Act.

A petition on behalf of an infant under the age of seven years for the purpose of obtaining a declaration of his legitimacy must be by a guardian appointed by the Court ; and in such a case the Court may, in the first instance, refer the matter to the Registrar to inquire whether the proposed suit is likely to be for the benefit of the infant or not ; and upon his report will determine whether the application ought to be granted. *In the matter of the petition of Chaplin*, L. R. 1 P. & D. 328 ; 36 L. J. P. & M. 49, and 90.

As to the election of guardians to minors, see Rules 105 to 107, and Form No. 14 in Appendix.

of such petition, be delivered to her Majesty's Attorney-General, who shall be a respondent upon the hearing of such petition and upon every subsequent proceeding relating thereto.<sup>4</sup>

Persons to  
be cited.

And by the 7th section, such person or persons (if any) besides the said Attorney-General as the Court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application.<sup>5</sup>

By the 8th section, the decree of the said Court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

And by the 10th section, no proceeding to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction.<sup>6</sup>

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<sup>4</sup> The Court will not make an order for the trial by jury of a petition unless there is some issue. In *Ryves v. The Attorney-General*, L. R. 1 P. & D. 23; 35 L. J. P. & M. 6, the answer of the Attorney-General did not traverse the allegations in the petition. The Court directed that subject to the Attorney-General amending his answer by formally traversing the allegations, and issue being joined, the cause should be tried by a jury.

<sup>5</sup> The Court will not decide who are the persons to be cited until the petitioner asks leave to cite them, and shows that they are fit to be cited; nor will a person be allowed to intervene upon his own application who has not been cited, and has no interest in opposing the petition. *Upton v. The Attorney-General*, 32 L. J. 177.

By s. 5, in all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any person cited, whether such person shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid.

<sup>6</sup> It has been held that as the petitioner has a right to have his case

The Act gives the Court no jurisdiction to investigate a claim to a title of honour; and allegations in a petition to the effect that by reason of the facts therein set out, the petitioner was entitled to a baronetcy, were ordered to be struck out as irrelevant.<sup>7</sup>

Nor has the Court jurisdiction to determine whether or not the petitioner is heir-at-law to another person, and allegations to that effect in the petition or in the prayer thereto are not admissible.<sup>8</sup>

The cause is to be heard and the allegations proved by oral or documentary evidence in the same manner as in other proceedings before the Court.<sup>9</sup>

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heard as between himself and the Attorney-General, the parties cited *pro interesse suo*, cannot plead *res judicata* between themselves and the petitioner in bar of the proceedings, for the above section does not mean that no proceeding shall be taken to affect any former judgments, but that no proceeding to be had under this Act shall do so. See *Shedden v. Patrick*, 2 S. & T. p. 181.

<sup>7</sup> *Frederick v. The Attorney-General & Frederick*, cited to see proceedings. L. R. 3 P. & D. 196; 43 L. J. P. & M. 32.

<sup>8</sup> *Mansel v. The Attorney-General*, L. R. 2 Prob. Div. 265; 46 L. J. P. & A. 64.

<sup>9</sup> In *Shedden v. Patrick*, 2 S. & T. 170, it was held that declarations of members of the family in questions of legitimacy are not admissible *post litem motam* whether the *lis* be known or not known to the person making the declaration. To constitute *lis mota* for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; there must have been controversy in respect of the very point in dispute as to which the evidence is tendered.

In *Frederick v. The Attorney-General, &c.*, L. R. 3 P. & D. 270; 44 L. J. P. & M. 1, letters passing between the members of a family discussing the question of the validity of the marriage sought to be established were held to constitute the beginning of a controversy, although no step was taken to litigate the question for more than seventy years subsequently to the dates of the letters; and all declarations by members of the family made subsequently to the dates of the letters were *post litem motam*, and therefore inadmissible in evidence.

When a motion is made for an order to examine witnesses abroad, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine. *Ryves v. The Attorney-General*, L. R. 1 P. & D. 23.



**APPENDIX.**

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**STATUTES:**

**RULES AND REGULATIONS:**

**FORMS:**

**TABLE OF FEES.**



## APPENDIX.

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ANNO VICESIMO & VICESIMO PRIMO VICTORIÆ  
REGINÆ.

### C A P. LXXXV.

An Act to amend the Law relating to Divorce and  
Matrimonial Causes in *England*. [28th August, 1857.]

WHEREAS it is expedient to amend the Law relating to Divorce, and to constitute a Court with exclusive Jurisdiction in Matters Matrimonial in *England*, and with Authority in certain Cases to decree the Dissolution of a Marriage: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. This Act shall come into operation on such Day, not sooner than the First Day of *January* One thousand eight hundred and fifty-eight, as Her Majesty shall by Order in Council appoint, provided that such Order be made One Month at least previously to the Day so to be appointed.

II. As soon as this Act shall come into operation, all Jurisdiction now exerciseable by any Ecclesiastical Court in *England* in respect of Divorces à Mens et Thoro, Suits of Nullity of Marriage, Suits of Jactitation of Marriage, Suits for Restitution of Conjugal Rights, and in all Causes, Suits, and Matters Matrimonial, shall cease to be so exerciseable, except so far as relates to the granting of Marriage Licenses, which may be granted as if this Act had not been passed.



The Court may enforce Decrees or Orders made before this Act comes into operation. III. Any Decree or Order of any Ecclesiastical Court of competent Jurisdiction which shall have been made before this Act comes into operation, in any Cause or Matter Matrimonial, may be enforced or otherwise dealt with by the Court for Divorce and Matrimonial Causes herein-after mentioned, in the same Way as if it had been originally made by the said Court under this Act.

Asto Suits pending when this Act comes into operation. IV. All Suits and Proceedings in Causes and Matters Matrimonial which at the Time when this Act comes into operation shall be pending in any Ecclesiastical Court in *England* shall be transferred to, dealt with, and decided by the said Court for Divorce and Matrimonial Causes as if the same had been originally instituted in the said Court.

Power to Judges whose Jurisdiction is determined to deliver written Judgments. V. Provided, That if at the Time when this Act comes into operation any Cause or Matter which would be transferred to the said Court for Divorce and Matrimonial Causes under the Enactment herein-before contained shall have been heard before any Judge having Jurisdiction in relation to such Cause or Matter, and be then standing for Judgment, such Judge may at any Time within Six Weeks after the Time when this Act comes into operation give in to One of the Registrars attending the Court for Divorce and Matrimonial Causes a written Judgment thereon signed by him; and a Decree or Order, as the Case may require, shall be drawn up in pursuance of such Judgment, and every such Decree or Order shall have the same Force and Effect as if it had been drawn up in pursuance of a Judgment of the Court for Divorce and Matrimonial Causes on the Day on which the same was delivered to the Registrar, and shall be subject to Appeal under this Act.

Jurisdiction over Causes Matrimonial to be exercised by the Court for Divorce and Matrimonial Causes. VI. As soon as this Act shall come into operation, all Jurisdiction now vested in or exerciseable by any Ecclesiastical Court or Person in *England* in respect of Divorces à Mens et Thoro, Suits of Nullity of Marriage, Suits for Restitution of Conjugal Rights, or Jactitation of Marriage, and in all Causes, Suits, and Matters Matrimonial, except in respect of Marriage Licences, shall belong to and be vested in Her Majesty, and such Jurisdiction, together with the Jurisdiction conferred by this

Act, shall be exercised in the Name of Her Majesty in a Court of Record to be called "The Court for Divorce and Matrimonial Causes."

VII. No Decree shall hereafter be made for a Divorce *à Mensâ et Thoro*, but in all Cases in which a Decree for a Divorce *à Mensâ et Thoro* might now be pronounced the Court may pronounce a Decree for a Judicial Separation, which shall have the same Force and the same Consequences as a Divorce *à Mensâ et Thoro* now has.

No Decree for Divorce *à Mensâ et Thoro* to be made hereafter, but a Judicial Separation.

VIII. The Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the Senior Puisne Judge for the Time being in each of the Three last-mentioned Courts, and the Judge of Her Majesty's Court of Probate constituted by any Act of the present Session, shall be the Judges of the said Court.

Judges of the Court.

IX. The Judge of the Court of Probate shall be called the Judge Ordinary of the said Court, and shall have full Authority, either alone or with One or more of the other Judges of the said Court, to hear and determine all Matters arising therein, except Petitions for the dissolving of or annulling Marriage, and Applications for new Trials of Questions or Issues before a Jury, Bills of Exception, Special Verdicts, and Special Cases, and, except as aforesaid, may exercise all the Powers and Authority of the said Court.

Judge of the Court of Probate to be the Judge Ordinary, and shall have full Authority, &c.

See 23 & 24 Vict. c. 144, s. 1.

X. All Petitions, either for the Dissolution or for a Sentence of Nullity of Marriage, and Applications for new Trials of Questions or Issues before a Jury, shall be heard and determined by Three or more Judges of the said Court, of whom the Judge of the Court of Probate shall be One.

Petitions for Dissolution of a Marriage, &c., to be heard by Three Judges.

See 23 & 24 Vict. c. 144, ss. 1, 2.

XI. During the temporary Absence of the Judge Ordinary, the Lord Chancellor may by Writing under his Hand authorize the Master of the Rolls, the Judge of the Admiralty Court, or either of the Lords Justices, or any Vice-Chancellor, or any Judge of the Superior Courts of Law at *Westminster*, to act as Judge Ordinary of the said Court for Divorce and Matrimonial Causes, and the Master of the Rolls, the Judge

Who to act as Judge during Absence of the Judge Ordinary.

of the Admiralty Court, Lord Justice, Vice-Chancellor, or Judge of the Superior Courts, shall, when so acting, have and exercise all the Jurisdiction, Power, and Authority which might have been exercised by the Judge Ordinary.

**Sittings of the Court.** XII. The Court for Divorce and Matrimonial Causes shall hold its Sittings at such Place or Places in *London* or *Middlesex* or elsewhere as Her Majesty in Council shall from Time to Time appoint.

**Seal of the Court.** XIII. The Lord Chancellor shall direct a Seal to be made for the said Court, and may direct the same to be broken, altered, and renewed, at his Discretion; and all Decrees and Orders, or Copies of Decrees or Orders, of the said Court, sealed with the said Seal, shall be received in Evidence.

**Officers of the Court.** XIV. The Registrars and other Officers of the Principal Registry of the Court of Probate shall attend the Sittings of the Court for Divorce and Matrimonial Causes, and assist in the Proceedings thereof, as shall be directed by the Rules and Orders under this Act.

**Power to Advocates, Barristers, &c., of Ecclesiastical and Superior Courts to practise in the Court.** XV. All Persons admitted to practise as Advocates or Proctors respectively in any Ecclesiastical Court in *England*, and all Barristers, Attornies, and Solicitors entitled to practise in the Superior Courts at *Westminster*, shall be entitled to practise in the Court of Divorce and Matrimonial Causes; and such Advocates and Barristers shall have the same relative Rank and Precedence which they now have in the Judicial Committee of the Privy Council, unless and until Her Majesty shall otherwise order.

**Sentence of Judicial Separation may be obtained by Husband or Wife for Adultery &c.** XVI. A Sentence of Judicial Separation (which shall have the Effect of a Divorce *à Mensâ et Thoro* under the existing Law, and such other legal Effect as herein mentioned,) may be obtained, either by the Husband or the Wife, on the Ground of Adultery, or Cruelty, or Desertion without Cause for Two Years and upwards. *See ss. 25, 26.*

Sections 17, 18, 19, 20 were repealed by 21 & 22 Vict. c. 108, s. 19.

**Wife deserted by her Husband may apply** XXI. A Wife deserted by her Husband may at any Time after such Desertion, if resident within the Metropolitan District, apply to a Police Magistrate, or if resident in the Country to Justices in Petty Sessions, or in either Case to the

Court, for an Order to protect any Money or Property she may acquire by her own lawful Industry, and Property which she may become possessed of, after such Desertion, against her Husband or his Creditors, or any Person claiming under him; and such Magistrate or Justices or Court, if satisfied of the Fact of such Desertion, and that the same was without reasonable Cause, and that the Wife is maintaining herself by her own Industry or Property, may make and give to the Wife an Order protecting her Earnings and Property acquired since the Commencement of such Desertion, from her Husband and all Creditors and Persons claiming under him, and such Earnings and Property shall belong to the Wife as if she were a Feme Sole: Provided always, that every such Order, if made by a Police Magistrate or Justices at Petty Sessions, shall, within Ten Days after the making thereof, be entered with the Registrar of the County Court within whose Jurisdiction the Wife is resident: and that it shall be lawful for the Husband, and any Creditor or other Person claiming under him, to apply to the Court, or to the Magistrate or Justices by whom such Order was made, for the Discharge thereof: Provided also, that if the Husband or any Creditor of or Person claiming under the Husband shall seize or continue to hold any Property of the Wife after Notice of any such Order, he shall be liable, at the Suit of the Wife (which she is empowered to bring), to restore the specific Property, and also for a Sum equal to double the Value of the Property so seized or held after such Notice as aforesaid: If any such Order of Protection be made, the Wife shall during the Continuance thereof be and be deemed to have been, during such Desertion of her, in the like Position in all respects, with regard to Property and Contracts, and suing and being sued, as she would be under this Act if she obtained a Decree of Judicial Separation.

to a Police  
Magistrate  
or Justices  
in Petty  
Sessions  
for Pro-  
tection.

See 21 & 22 Vict. c. 108. ss. 6, 7, 8, 9, 10; and 27 & 28 Vict. c. 44.

XXII. In all Suits and Proceedings, other than any Proceedings to dissolve any Marriage, the said Court shall proceed and act and give Relief on Principles and Rules which in the Opinion of the said Court shall be as nearly as

Court  
to act on  
Principles  
of the Ec-  
clesiastical  
Courts.

may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted and given Relief, but subject to the Provisions herein contained and to the Rules and Orders under this Act.

Decree of Separation obtained during the Absence of Husband or Wife may be reversed.

XXIII. Any Husband or Wife, upon the Application of whose Wife or Husband, as the Case may be, a Decree of Judicial Separation has been pronounced, may, at any Time thereafter, present a petition to the Court praying for a Reversal of such Decree on the Ground that it was obtained in his or her Absence, and that there was reasonable Ground for the alleged Desertion, where Desertion was the Ground of such Decree; and the Court, may, on being satisfied of the Truth of the Allegations of such Petition, reverse the Decree accordingly, but the Reversal thereof shall not prejudice or affect the Rights or Remedies which any other Person would have had in case such Reversal had not been decreed, in respect of any Debts, Contracts, or Acts of the Wife incurred, entered into, or done between the Times of the Sentence of Separation and of the Reversal thereof.

Court may direct Payment of Alimony to Wife or to her Trustee.

XXIV. In all Cases in which the Court shall make any Decree or Order for Alimony, it may direct the same to be paid either to the Wife herself or to any Trustee on her Behalf, to be approved by the Court, and may impose any Terms or Restrictions which to the Court may seem expedient, and may from Time to Time appoint a new Trustee, if for any Reason it shall appear to the Court expedient so to do.

In case of Judicial Separation the Wife to be considered a Feme Sole with respect to Property she may acquire, &c.;

XXV. In every Case of a Judicial Separation the Wife shall, from the Date of the Sentence and whilst the Separation shall continue, be considered as a Feme Sole with respect to Property of every Description which she may acquire or which may come to or devolve upon her; and such Property may be disposed of by her in all respects as a Feme Sole, and on her Decease the same shall, in case she shall die intestate, go as the same would have gone if her Husband had been then dead; provided, that if any such Wife should again cohabit with her Husband, all such Property as she may be entitled to when such Cohabitation shall take place shall be

held to her separate Use, subject, however, to any Agreement in Writing made between herself and her Husband whilst separate.

XXVI. In every Case of a Judicial Separation the Wife also, for shall, whilst so separated, be considered as a Feme Sole for Purposes of Contract, and Wrongs and Injuries, and Contract and suing. suing and being sued in any Civil Proceeding; and her Husband shall not be liable in respect of any Engagement or Contract she may have entered into, or for any wrongful Act or Omission by her, or for any Costs she may incur as Plaintiff or Defendant: provided, that where upon any such Judicial Separation Alimony has been decreed or ordered to be paid to the Wife, and the same shall not be duly paid by the Husband, he shall be liable for Necessaries supplied for her Use; provided also, that nothing shall prevent the Wife from joining, at any Time during such Separation, in the Exercise of any joint Power given to herself and her Husband.

XXVII. It shall be lawful for any Husband to present a On Adultery of Wife or Incest, &c. Petition to the said Court, praying that his Marriage may be dissolved, on the Ground that his Wife has since the Celebration thereof been guilty of Adultery; and it shall be lawful for any wife to present a Petition to the said Court, praying that her Marriage may be dissolved, on the Ground that since the Celebration thereof her Husband has been guilty of Marriage for Dissolution of Marriage may be presented. incestuous Adultery, or of Bigamy with Adultery, or of Rape, or of Sodomy or Bestiality, or of Adultery coupled with such Cruelty as without Adultery would have entitled her to a Divorce à Mensâ et Thoro, or of Adultery coupled with Desertion, without reasonable excuse, for Two Years or upwards; and every such Petition shall state as distinctly as the Nature of the Case permits the Facts on which the Claim to have such Marriage dissolved is founded: Provided that for the Purposes of this Act incestuous Adultery shall be taken to mean Adultery committed by a Husband with a Woman with whom if his Wife were dead he could not lawfully contract Marriage by reason of her being within the prohibited Degrees of Consanguinity or Affinity; and Bigamy shall be taken to mean Marriage of any Person, being

As to "Incestuous Adultery."

married, to any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken place within the Dominions of Her Majesty or elsewhere.

Adulterer  
to be a  
Co-Re-  
spondent.

XXVIII. Upon any such Petition presented by a Husband the Petitioner shall make the alleged Adulterer a Co-Respondent to the said Petition, unless on special Grounds, to be allowed by the Court, he shall be excused from so doing; and on every Petition presented by a Wife for Dissolution of Marriage, the Court, if it see fit, may direct that the Person with whom the Husband is alleged to have committed Adultery be made a Respondent; and the Parties or either of them may insist on having the contested Matters of Fact tried by a jury as herein-after mentioned.

Cause may  
be tried by  
a Jury.

Court to  
be satisfied  
of Ab-  
sence of  
Collusion.

XXIX. Upon any such Petition for the Dissolution of a Marriage, it shall be the Duty of the Court to satisfy itself, so far as it reasonably can, not only as to the Facts alleged, but also whether or no the Petitioner has been in any Manner accessory to or conniving at the Adultery, or has condoned the same, and shall also inquire into any Counter-charge which may be made against the Petitioner.

Dismissal  
of Petition.

XXX. In case the Court, on the Evidence in relation to any such Petition, shall not be satisfied that the alleged Adultery has been committed, or shall find that the Petitioner has during the Marriage been accessory to or conniving at the Adultery of the other Party to the Marriage, or has condoned the Adultery complained of, or that the Petition is presented or prosecuted in collusion with either of the Respondents, then and in any of the said Cases the Court shall dismiss the said Petition.

Power to  
Court to  
pronounce  
Decree for  
dissolving  
Marriage.

XXXI. In case the Court shall be satisfied on the Evidence that the Case of the Petitioner has been proved, and shall not find that the Petitioner has been in any Manner accessory to or conniving at the Adultery of the other Party to the Marriage, or has condoned the Adultery complained of, or that the Petition is presented or prosecuted in collusion with either of the Respondents, then the Court shall pronounce a Decree declaring such Marriage to be dissolved: Provided always, that the Court shall not be bound to pronounce such Decree

if it shall find that the Petitioner has during the Marriage been guilty of Adultery, or if the Petitioner shall, in the Opinion of the Court, have been guilty of unreasonable Delay in presenting or prosecuting such Petition, or of Cruelty towards the other Party to the Marriage, or of having deserted or wilfully separated himself or herself from the other Party before the Adultery complained of, and without reasonable Excuse, or of such wilful Neglect or Misconduct as has conduced to the Adultery.

XXXII. The Court may, if it shall think fit, on any such Alimony. Decree, order that the Husband shall to the Satisfaction of the Court secure to the Wife such gross Sum of Money, or such annual Sum of Money for any Term not exceeding her own Life, as, having regard to her Fortune (if any), to the Ability of the Husband, and to the Conduct of the Parties, it shall deem reasonable, and for that Purpose may refer it to any one of the Conveyancing Counsel of the Court of Chancery to settle and approve of a proper Deed or Instrument to be executed by all necessary Parties; and the said Court may in such Case, if it shall see fit, suspend the pronouncing of its Decree until such Deed shall have been duly executed; and upon any Petition for Dissolution of Marriage the Court shall have the same Power to make interim Orders for Payment of Money, by way of Alimony or otherwise, to the Wife, as it would have in a Suit instituted for Judicial Separation.

*See 29 Vict. c. 32, s. 1.*

XXXIII. Any Husband may, either in a Petition for Husband Dissolution of Marriage or for Judicial Separation, or in a <sup>may claim</sup> Petition limited to such Object only, claim <sup>Damages</sup> Damages from <sup>from Adul-</sup> any Person on the Ground of his having committed Adultery <sup>terers.</sup> with the Wife of such Petitioner, and such Petition shall be served on the alleged Adulterer and the Wife, unless the Court shall dispense with such Service, or direct some other Service to be substituted; and the Claim made by every such Petition shall be heard and tried on the same Principles, in the same Manner, and subject to the same or the like Rules and Regulations as Actions for Criminal Conversation are now tried and decided in Courts of Common Law; and all



the Enactments herein contained with reference to the Hearing and Decision of Petitions to the Court shall, so far as may be necessary, be deemed applicable to the Hearing and Decision of Petitions presented under this Enactment; and the Damages to be recovered on any such Petition shall in all Cases be ascertained by the Verdict of a Jury, although the Respondents or either of them may not appear; and after the Verdict has been given the Court shall have Power to direct in what Manner such Damages shall be paid or applied, and to direct that the whole or any Part thereof shall be settled for the Benefit of the Children (if any) of the Marriage, or as a Provision for the Maintenance of the Wife.

Power to  
Court to  
order  
Adulterer  
to pay  
Costs.

XXXIV. Whenever in any Petition presented by a Husband the alleged Adulterer shall have been made a Co-Respondent, and the Adultery shall have been established, it shall be lawful for the Court to order the Adulterer to pay the whole or any Part of the Costs of the Proceedings.

Power to  
Court to  
make  
Orders as  
to Custody  
of  
Children.

XXXV. In any Suit or other Proceeding for obtaining a Judicial Separation or a Decree of Nullity of Marriage, and on any Petition for dissolving a Marriage, the Court may from Time to Time, before making its final Decree, make such interim Orders, and may make such Provision in the final Decree, as it may deem just and proper with respect to the Custody, Maintenance, and Education of the Children the Marriage of whose Parents is the Subject of such Suit or other Proceeding, and may, if it shall think fit, direct proper Proceedings to be taken for placing such Children under the Protection of the Court of Chancery.

Questions  
of Fact  
may be  
tried  
before the  
Court.

XXXVI. In Questions of Fact arising in Proceedings under this Act it shall be lawful for, but, except as herein-before provided, not obligatory upon, the Court to direct the Truth thereof to be determined before itself, or before any One or more of the Judges of the said Court, by the Verdict of a Special or Common Jury.

*See s. 28.*

Where a  
Question  
is ordered  
to be tried

XXXVII. The Court, or any Judge thereof, may make all such Rules and Orders upon the Sheriff or any other Person for procuring the Attendance of a Special or Common Jury

for the Trial of such Question as may now be made by any of a Jury the Superior Courts of Common Law at *Westminster*, and may also make any other Orders which to such Court or Judge may seem requisite; and every such Jury shall consist of Persons possessing the like Qualifications, and shall be struck, summoned, balloted for, and called in like Manner, as if such Jury were a Jury for the Trial of any Cause in any of the said Superior Courts; and every Juryman so summoned shall be entitled to the same Rights, and subject to the same Duties and Liabilities, as if he had been duly summoned for the Trial of any such Cause in any of the said Superior Courts; and every Party to any such Proceeding shall be entitled to the same Rights as to Challenge and otherwise as if he were a Party to any such Cause.

may be summoned as in the Common Law Courts.

Rights to Challenge.

XXXVIII. When any such Question shall be so ordered to be tried such Question shall be reduced into Writing in such Form as the Court shall direct, and at the Trial the Jury shall be sworn to try the said Question, and a true Verdict to give thereon according to the Evidence; and upon every such Trial the Court or Judge shall have the same Powers, Jurisdiction, and Authority as any Judge of any of the said Superior Courts sitting at *Nisi Prius*.

Such Question to be reduced into Writing, and a Jury to be sworn to try it. Judge to have same Powers as at *Nisi Prius*.

XXXIX. Upon the Trial of any such Question or of any Issue under this Act a Bill of Exceptions may be tendered, and a General or Special Verdict or Verdicts, subject to a Special Case, may be returned, in like Manner as in any Cause tried in any of the said Superior Courts; and every such Bill of Exceptions, Special Verdict, and Special Case respectively shall be stated, settled, and sealed in like Manner as in any Cause tried in any of the said Superior Courts, and where the Trial shall not have been had in the Court of Divorce and Matrimonial Causes shall be returned into such Court without any Writ of Error or other Writ; and the Matter of Law in every such Bill of Exceptions, Special Verdict, and Special Case shall be heard and determined by the full Court, subject to the Right of Appeal as is hereinafter given in other Cases.

Bill of Exceptions, Special Verdict, and Special Case.

XL. It shall be lawful for the Court to direct One or more Issue or Issues to be tried in any Court of Common Law, and

Court may direct

**Issues to try any Fact.** either before a Judge of Assize in any County or at the Sittings for the Trial of Causes in *London* or *Middlesex*, and either by a Special or Common Jury, in like Manner as is now done by the Court of Chancery.

**Affidavit in support of a Petition.** XLII. Every Person seeking a Decree of Nullity of Marriage, or a Decree of Judicial Separation, or a Dissolution of Marriage, or Decree in a Suit of Jactitation of Marriage, shall, together with the Petition or other Application for the same, file an Affidavit verifying the same so far as he or she is able to do so, and stating that there is not any Collusion or Connivance between the Deponent and the other Party to the Marriage.

**Service of Petition.** XLIII. Every such Petition shall be served on the Party to be affected thereby, either within or without Her Majesty's Dominions, in such Manner as the Court shall by any General or Special Order from Time to Time direct, and for that Purpose the Court shall have all the Powers conferred by any Statute on the Court of Chancery: Provided always, that the said Court may dispense with such Service altogether in case it shall seem necessary or expedient so to do.

**Examination of Petitioner.** XLIII. The Court may, if it should think fit, order the Attendance of the Petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on Oath on the Hearing of any Petition, but no such Petitioner shall be bound to answer any Question tending to show that he or she has been guilty of Adultery.

**Adjournment.** XLIV. The Court may from Time to Time adjourn the Hearing of any such Petition, and may require further Evidence thereon, if it shall see fit so to do.

**Court may order Settlement of Property for Benefit of innocent Party and Children of Marriage.** XLV. In any Case in which the Court shall pronounce a Sentence of Divorce or Judicial Separation for Adultery of the Wife, if it shall be made appear to the Court that the Wife is entitled to any Property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such Settlement as it shall think reasonable to be made of such Property or any Part thereof, for the Benefit of the innocent Party, and of the Children of the Marriage, or either or any of them.

*See 23 & 24 Vict. c. 144, s. 6.*

XLVI. Subject to such Rules and Regulations as may be established as herein provided, the Witnesses in all Proceedings before the Court where their Attendance can be had shall be sworn and examined orally in open Court: Provided that Parties, except as herein-before provided, shall be at liberty to verify their respective Cases in whole or in part by Affidavit, but so that the Deponent in every such Affidavit shall, on the Application of the opposite Party or by Direction of the Court, be subject to be cross-examined by or on behalf of the opposite Party orally in open Court, and after such Cross-examination may be re-examined in open Court as aforesaid by or on behalf of the Party by whom such Affidavit was filed.

Mode of  
taking  
Evidence.

XLVII. Provided, That where a Witness is out of the Jurisdiction of the Court, or where, by reason of his Illness or from other Circumstances, the Court shall not think fit to enforce the Attendance of the Witness in open Court, it shall be lawful for the Court to order a Commission to issue for the Examination of such Witness on Oath, upon Interrogatories or otherwise, or if the Witness be within the Jurisdiction of the Court to order the Examination of such Witness on Oath, upon Interrogatories or otherwise, before any Officer of the said Court, or other Person to be named in such Order for the Purpose; and all the Powers given to the Courts of Law at *Westminster* by the Acts of the Thirteenth Year of King *George* the Third, Chapter Sixty-three, and of the First Year of King *William* the Fourth, Chapter Twenty-two, for enabling the Courts of Law at *Westminster* to issue Commissions and give Orders for the Examination of Witnesses in Actions depending in such Courts, and to enforce such Examination, and all the Provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such Examination and the Witnesses examined, shall extend and be applicable to the Court and to the Examination of Witnesses under the Commissions and Orders of the said Court, and to the Witnesses examined, as if such Court were One of the Courts of Law at *Westminster*, and the Matter before it were an Action pending in such Court.

Court may  
issue Com-  
missions  
or give  
Orders for  
Examina-  
tion of  
Witnesses  
abroad or  
unable to  
attend.

XLVIII. The Rules of Evidence observed in the Superior Rules of  
Evidence.

Courts of Common Law at *Westminster* shall be applicable to and observed in the Trial of all Questions of Fact in the Court.

Attend-  
ance of  
Witnesses  
on the  
Court.

XLIX. The Court may, under its Seal, issue Writs of Subpoena or Subpoena duces tecum, commanding the Attendance of Witnesses at such Time and Place as shall be therein expressed; and such Writs may be served in any Part of *Great Britain* or *Ireland*; and every Person served with such Writ shall be bound to attend, and to be sworn and give Evidence in obedience thereto, in the same Manner as if it had been a Writ of Subpoena or Subpoena duces tecum issued from any of the said Superior Courts of Common Law in a Cause pending therein, and served in *Great Britain* or *Ireland*, as the Case may be: Provided that any Petitioner required to be examined, or any Person called as a Witness or required or desiring to make an Affidavit or Deposition under or for the purposes of this Act, shall be permitted to make his solemn Affirmation or Declaration instead of being sworn in the Circumstances and Manner in which a Person called as a Witness or desiring to make an Affidavit or Deposition would be permitted so to do under the "Common Law Procedure Act, 1854," in Cases within the Provisions of that Act.

Penalties  
for false  
Evidence.

L. All Persons wilfully deposing or affirming falsely in any Proceeding before the Court shall be deemed to be guilty of Perjury, and shall be liable to all the Pains and Penalties attached thereto.

Costs.

LI. The Court on the Hearing of any Suit, Proceeding, or Petition under this Act, and the House of Lords on the Hearing of any Appeal under this Act, may make such Order as to Costs as to such Court or House respectively may seem just: Provided always, that there shall be no Appeal on the Subject of Costs only.

Enforce-  
ment of  
Orders and  
Decrees.

LII. All Decrees and Orders to made by the Court in any Suit, Proceeding, or Petition to be instituted under Authority of this Act shall be enforced and put in execution in the same or the like Manner as the Judgments, Orders, and Decrees of the High Court of Chancery may be now enforced and put in execution.

Power to  
make  
Rules, &c.

LIII. The Court shall make such Rules and Regulations concerning the Practice and Procedure under this Act as it

may from Time to Time consider expedient, and shall have full Power from Time to Time to revoke or alter the same.

LIV. The Court shall have full Power to fix and regulate Fees to be from Time to Time the Fees payable upon all Proceedings regulated. before it, all which Fees shall be received, paid, and applied as herein directed: Provided always, that the said Court may make such Rules and Regulations as it may deem necessary and expedient for enabling Persons to sue in the said Court *in forma pauperis*.

LV. Either Party dissatisfied with any Decision of the Appeal Court in any Matter which, according to the Provisions from the aforesaid, may be made by the Judge Ordinary alone, may, Judge Ordinary within Three Calendar Months after the pronouncing thereof, to the full appeal there from to the full Court, whose Decision shall be Court. final.

S. 56 was repealed by 31 & 32 Vict. c. 77, s. 2.

LVII. When the Time hereby limited for appealing against Liberty to any Decree dissolving a Marriage shall have expired, and no Parties to Appeal shall have been presented against such Decree, or marry again. when any such Appeal shall have been dismissed, or when in the Result of any Appeal any Marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective Parties thereto to marry again, as if the prior Marriage had been dissolved by Death: Provided always, No Clergy- that no Clergyman in Holy Orders of the United Church of man com- *England and Ireland* shall be compelled to solemnize the pelled to certain Marriage of any Person whose former Marriage may have solemnize been dissolved on the Ground of his or her Adultery; or shall certain Marriages. be liable to any Suit, Penalty, or Censure for solemnizing or refusing to solemnize the Marriage of any such Person.

LVIII. Provided always, That when any Minister of any If Minister Church or Chapel of the United Church of *England and Ireland* shall refuse to perform such Marriage Service of any Church, &c. refuses to perform Marriage between any Persons who but for such Refusal would be Marriage Ceremony, entitled to have the same Service performed in such Church any other Minister in Holy Orders of the said United Church, entitled to officiate Minister may per- within the Diocese in which such Church or Chapel is situate, form such Service. to perform such Marriage Service in such Church or Chapel.

**No Action in England for Crim. Con.** LIX. After this Act shall have come into operation no Action shall be maintainable in *England* for Criminal Conversation.

**All Fees, except as herein provided, to be collected by Stamps.** LX. None of the Fees payable under this Act, except as herein expressly provided, shall be received in Money, but every such Fee shall be collected and received by a Stamp denoting the Amount of the Fee which would otherwise be payable; and the Fees to be so collected by Stamps shall be "Stamp Duties," and be under the Management of the Commissioners of Inland Revenue.

**Provisions concerning Stamps for the Court of Probate to be applicable to the Purposes of this Act.** LXI. The Provisions contained in or referred to by an Act of the present Session of Parliament, "to amend the Laws relating to Probates and Letters of Administration in *England*," and applicable to the Collection and Payment and Accounts of the Fees to be received thereunder by means of Stamps, and to such Stamps, and the Vellum, Parchment, or Paper on or to which the same shall be impressed or affixed, and in relation to Documents which ought to have Stamps impressed thereon or affixed thereto, and to the Punishment of Persons for such wrongful Acts as therein mentioned in relation to Stamps, or Fees or Sums of Money which ought to be collected by means of Stamps, shall be applicable to and for the Purposes of this Act, as if such Provisions as aforesaid had been contained or referred to in this Act with reference to the like Matters, and the Court under this Act had been mentioned, instead of the Court of Probate, or the Judge thereof, as the Case may be.

**Expenses of the Court to be paid out of Monies to be provided by Parliament.** LXII. It shall be lawful for the Commissioners of Her Majesty's Treasury, out of such Monies as may be provided and appropriated by Parliament for the Purpose, to cause to be paid all necessary Expenses of the Court under this Act, and other Expenses which may be incurred in carrying the Provisions of this Act into effect, except as herein otherwise provided.

**Stamp Duty on Admission of Proctors.** LXIII. The same Amount of Stamp Duty as is now payable on the Admission of a Proctor to any Ecclesiastical Court shall be payable by every Person to be admitted as a Proctor in the Court of Divorce and Matrimonial Causes, or in the Court of Probate, who shall not have been previously

admitted as a Proctor in the other of such Courts, or in an Ecclesiastical or Admiralty Court, and have paid the Stamp Duty in respect thereof; and every Person who shall practise as a Proctor or as a Solicitor or Attorney in the said Court of Divorce and Matrimonial Causes, or the said Court of Probate, shall obtain an annual Certificate to authorize him so to do, under the Stamp Duty Acts, in the same Manner as Proctors practising in the Ecclesiastical or Admiralty Courts, and Solicitors and Attornies practising in Her Majesty's Courts at *Westminster*, are now required to do by the said Acts or any of them, and shall be subject and liable to the same Penalties and Disabilities in case of any Neglect to obtain such Certificates as such Proctors, Attornies, and Solicitors are now subject and liable to for any similar Neglect, and as if the Clauses and Provisions of the said Acts in relation to such Certificates had been inserted in this Act, and specially enacted in reference to Proctors, Solicitors, and Attornies practising in the said Court of Divorce and Matrimonial Causes and Court of Probate, provided that One Annual Certificate only shall be required for any one Person, although he may practise in more than One of the Capacities aforesaid, or in several of the Courts herein-before mentioned.

LXIV. Every Person who at the Time of the passing of this Act has been duly admitted and is practising as a Proctor in any Ecclesiastical Court in *England* shall, at the Expiration of Two Years from and after the Commencement of this Act, be entitled to make a Claim for Compensation to the Commissioners of Her Majesty's Treasury; and the said Commissioners, by Examination of Evidence on Oath (which they are hereby empowered to administer), or otherwise, as they shall think fit, shall inquire into and ascertain the Loss, if any, of Professional Gains and Profits in respect of Suits relating to Marriage and Divorce sustained by such Proctors respectively, upon a Comparison in each Case of the average clear Gains of the Three Years immediately before the Commencement of this Act, arising from such last-mentioned Business, and the Average of the same Gains during the Two Years immediately succeeding the Commencement of this Act; and the said Commissioners shall in each Case, having

and annual  
Certifi-  
cates.

Compensation to  
Proctors.



regard to all the Circumstances, award a reasonable Compensation, by way of Annuity, to the Persons sustaining such Loss, during their Lives, but in no Case shall such Annuity exceed One Half of the annual Loss so ascertained as aforesaid; and such Annuities shall be paid out of Monies to be annually provided by Parliament for that Purpose, and the Persons receiving the same shall be subject to the Provisions contained in the Nineteenth Section of the Act of Fourth and Fifth *William the Fourth*, Chapter Twenty-four.

As to  
Salary of  
Judge of  
Court of  
Probate, if  
appointed  
Judge of  
Court of  
Divorce,  
&c.

LXV. In case the Judge of the Court of Probate established by any Act passed during the present Session shall be appointed Judge Ordinary of the Court for Divorce and Matrimonial Causes, the Salary of such Judge shall be the Sum of Five thousand Pounds *per Annum*; but such Judge, if afterwards appointed Judge of the Admiralty Court, shall not be entitled to any Increase of Salary.

Power to  
Secretary  
of State to  
order all  
Letters  
Patent,  
Records,  
&c. to be  
trans-  
mitted  
from all  
Ecclesias-  
tical  
Courts.

LXVI. Any One of Her Majesty's Principal Secretaries of State may order every Judge, Registrar, or other Officer of any Ecclesiastical Court in *England* or the *Isle of Man*, or any other Person having the public Custody of or Control over any Letters Patent, Records, Deeds, Processes, Acts, Proceedings, Books, Documents, or other Instrument relating to Marriages, or to Suits for Divorce, Nullity of Marriage, Restitution of Conjugal Rights, or to any other Matters or Causes Matrimonial, except Marriage Licences, to transmit the same, at such Times and in such Manner, to such Places in *London* or *Westminster*, and under such Regulations, as the said Secretary of State may appoint; and if any Judge, Registrar, Officer, or other Person shall wilfully disobey such Order he shall for the First Offence forfeit the Sum of One hundred Pounds, to be recoverable by any Registrar of the Court of Probate as a Debt under this Act in any of the Superior Courts at *Westminster*, and for the Second and subsequent Offences the Judge Ordinary may commit the Person so offending to Prison for any Period not exceeding Three Calendar Months, provided that the Warrant of Committal be countersigned by One of Her Majesty's Principal Secretaries of State, and the said Persons so offending shall forfeit all Claim to Compensation under this Act.

Penalty on  
disobeying  
such  
Order.

LXVII. All Rules and Regulations concerning Practice or Procedure, or fixing or regulating Fees, which may be made by the Court under this Act, shall be laid before both Houses of Parliament within One Month after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within One Month after the Commencement of the then next Session of Parliament.

Rules, &c.,  
to be laid  
before  
Parliament.

LXVIII. The Judge Ordinary of the Court for Divorce and Matrimonial Causes for the Time being shall cause to be prepared in each Year ending *December* Thirty-one a Return of all Fees and Monies levied in such Year on account of the Fee Fund of the Court of Divorce and Matrimonial Causes, and of any other Fund under the Authority of this Act; also, a Return of the annual Salaries of the said Judge Ordinary, and of all Persons holding Offices in the said Court, with all the incidental Expenses of the said Court, whether the Salaries and incidental Expenses aforesaid be defrayed out of Fees or out of any other Monies; also, a Return of all Superannuations, Pensions, Annuities, retiring Allowances, and Compensations made payable under this Act, in each Year, stating the gross Amount, and the Amount in detail, of such Charges: Provided always, that all such Returns as aforesaid shall be presented to both Houses of Parliament on or before the Thirty-first Day of *March* in each Year, if Parliament is then sitting, and if Parliament is not sitting, then such Returns shall be presented within One Month of the First Meeting of Parliament after the Thirty-first Day of *March* in each Year.

Yearly  
Account of  
Fees, &c.,  
to be laid  
before  
Parliament.

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ANNO VICESIMO PRIMO & VICESIMO SECUNDO  
VICTORIÆ REGINÆ.

CAP. XCIII.

An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the Right to be deemed natural-born Subjects. [2nd August, 1858.]

WHEREAS it is expedient to enable Persons to establish their Legitimacy, and the marriage of their Parents and

others from whom they may be descended, and also to enable Persons to establish their Right to be deemed natural-born Subjects : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Applica-  
tion to  
Court for  
Divorce  
and Matri-  
monial  
Causes for  
Declara-  
tion of Le-  
gitimacy or  
Validity or  
Invalidity  
of Mar-  
riage.

I. Any natural-born Subject of the Queen, or any Person whose Right to be deemed a natural-born Subject depends wholly or in part on his Legitimacy or on the Validity of a Marriage, being domiciled in *England* or *Ireland*, or claiming any Real or Personal Estate situate in *England*, may apply by Petition to the Court for Divorce and Matrimonial Causes, praying the Court for a Decree declaring that the Petitioner is the legitimate Child of his Parents, and that the Marriage of his Father and Mother, or of his Grandfather and Grandmother, was a valid Marriage, or for a Decree declaring either of the Matters aforesaid; and any such Subject or Person, being so domiciled or claiming as aforesaid, may in like Manner apply to such Court for a Decree declaring that his Marriage was or is a valid Marriage, and such Court shall have Jurisdiction to hear and determine such Application, and to make such Decree declaratory of the Legitimacy or Illegitimacy of such Person, or of the Validity or Invalidity of such Marriage, as to the Court may seem just; and such Decree, except as herein-after mentioned, shall be binding to all Intents and Purposes on Her Majesty and on all Persons whomsoever.

Applica-  
tion to  
Court for  
Declara-  
tion of  
Right to  
be deemed  
a natural-  
born  
Subject.

II. Any Person, being so domiciled or claiming as aforesaid, may apply by Petition to the said Court for a Decree declaratory of his Right to be deemed a natural-born Subject of Her Majesty, and the said Court shall have Jurisdiction to hear and determine such Application, and to make such Decree thereon as to the Court may seem just; and where such Application as last aforesaid is made by the Person making such Application as herein mentioned for a Decree declaring his Legitimacy or the Validity of a Marriage, both Applications may be included in the same Petition; and every Decree made by the said Court shall, except as herein-

after mentioned, be valid and binding to all Intents and Purposes upon Her Majesty and all Persons whomsoever.

III. Every Petition under this Act shall be accompanied by such Affidavit verifying the same, and of the Absence of Collusion, as the Court may by any General Rule direct. Petition to be accompanied by Affidavit.

IV. All the Provisions of the Act of the last Session, Chapter Eighty-five, so far as the same may be applicable, and the Powers and Provisions therein contained in relation to the making and laying before Parliament of Rules and Regulations concerning the Practice and Procedure under that Act, and fixing the Fees payable upon Proceedings before the Court, shall extend to Applications and Proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last Session. 20 & 21 Vict. c. 85, to apply to Proceedings under this Act.

V. In all Proceedings under this Act the Court shall have full Power to award and enforce Payment of Costs to any Persons cited, whether such Persons shall or shall not oppose the Declaration applied for, in case the said Court shall deem it reasonable that such Costs shall be paid. Power to award and enforce Payment of Costs.

VI. A Copy of every Petition under this Act, and of the Affidavit accompanying the same, shall, One Month at least previously to the Presentation or filing of such Petition, be delivered to Her Majesty's Attorney General, who shall be a Respondent upon the Hearing of such Petition and upon every subsequent Proceeding relating thereto. Attorney-General to have a Copy of Petition One Month before it is filed.

VII. Where any Application is made under this Act to the said Court such Person or Persons (if any) besides the said Attorney General as the Court shall think fit shall, subject to the Rules made under this Act, be cited to see Proceedings or otherwise summoned in such Manner as the Court shall direct, and may be permitted to become Parties to the Proceedings, and oppose the Application. Court may require Persons to be cited.

VIII. The Decree of the said Court shall not in any Case prejudice any Person, unless such Person has been cited or made a Party to the Proceedings, or is the Heir-at-Law or next of Kin or other Real or Personal Representative of or derives Title under or through a Person so cited or made a Party; nor shall such Sentence or Decree of the Court prejudice any Saving for Rights of Persons not cited.

Person if subsequently proved to have been obtained by Fraud or Collusion.

Person domiciled in Scotland may insist, on an Action of Declarator, that he is a natural-born Subject.

IX. Any Person domiciled in *Scotland*, or claiming any Heritable or Moveable Property situate in *Scotland*, may raise and insist, in an Action of Declarator before the Court of Session, for the Purpose of having it found and declared that he is entitled to be deemed a natural-born Subject of Her Majesty; and the said Court shall have Jurisdiction to hear and determine such Action of Declarator, in the same Manner and to the same Effect, and with the same Power to award Expenses, as they have in Declarators of Legitimacy and Declarators of Bastardy.

X. No Proceeding to be had under this Act shall affect any final Judgment or Decree already pronounced or made by any Court of competent Jurisdiction.

Acts to be read together.

XI. The said Act of the last Session and this Act shall be construed together as One Act; and this Act may be cited for all Purposes as "The Legitimacy Declaration Act, 1858."

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ANNO VICESIMO PRIMO & VICESIMO SECUNDO  
VICTORIÆ REGINÆ.

CAP. CVIII.

An Act to amend the Act of the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five. [2nd August, 1858.]

20 & 21 Vict. c. 85. WHEREAS in the last Session of Parliament an Act was passed, intituled *An Act to amend the Law relating to Divorce and Matrimonial Causes in England*: And whereas it is expedient to amend the same: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

The Judge Ordinary of the I. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes for the Time being to sit

in Chambers for the Despatch of such Part of the Business of Court for the said Court as can in the Opinion of the said Judge <sup>Divorce</sup> Ordinary, with Advantage to the Suitors, be heard in <sup>and Matri-</sup> Chambers; and such Sittings shall from Time to Time be <sup>monial</sup> appointed by the said Judge Ordinary. <sup>Causes may sit in Chambers.</sup>

II. The Commissioners of Her Majesty's Treasury shall <sup>The Treas-</sup> from Time to Time provide Chambers in which the said Judge <sup>ury to</sup> Ordinary shall sit for the Despatch of such Business as <sup>cause</sup> aforesaid, and until such Chambers are provided the said <sup>Chambers</sup> Judge Ordinary shall sit in Chambers in any Room which he <sup>to be provided.</sup> may find convenient for the Purpose.

III. The said Judge Ordinary when so sitting in Chambers <sup>Power of</sup> shall have and exercise the same Power and Jurisdiction in <sup>Judge in</sup> respect of the Business to be brought before him as if sitting <sup>Chambers.</sup> in open Court.

IV. The Registrars of the Principal Registry of the Court <sup>The Regis-</sup> of Probate shall be invested with and shall and may exercise <sup>trars to do</sup> with reference to Proceedings in the Court for Divorce and <sup>all Acts</sup> Matrimonial Causes the same Power and Authority which <sup>heretofore</sup> Surrogates of the Official Principal of the Court of Arches <sup>done by</sup> could or might before the passing of the Twentieth and <sup>Surro-</sup> Twenty-first *Victoria*, Chapter Seventy-seven, have exercised <sup>gates.</sup> in Chambers with reference to Proceedings in that Court.

V. In every Cause in which a Sentence of Divorce and <sup>Evidence</sup> Separation from Bed, Board, and mutual Cohabitation has <sup>on which</sup> been given by a competent Ecclesiastical Court before the Act <sup>Divorce</sup> of the Twentieth and Twenty-first *Victoria*, Chapter Eighty- <sup>obtained</sup> five, came into operation, the Evidence in the Cause in which <sup>prior to</sup> such Sentence was pronounced in such Ecclesiastical Court <sup>20 & 21</sup> may, whenever from the Death of a Witness or from any <sup>Vict. c. 85,</sup> other Cause it may appear to the Court reasonable and proper, <sup>may be</sup> be received on the hearing of any Petition which may be <sup>used in</sup> presented to the said Court for Divorce and Matrimonial <sup>support of</sup> Causes. <sup>Petition in</sup>

VI. Every Wife deserted by her Husband, wheresoever <sup>Wives</sup> resident in *England*, may, at any Time after such Desertion, <sup>deserted</sup> apply to the said Judge Ordinary for an Order to protect any <sup>by their</sup> Money or Property in *England* she may have acquired or may <sup>Husbands</sup> acquire by her own lawful Industry, and any Property she <sup>may apply</sup> Judge for

an Order to protect Property, &c., acquired by them. may have become possessed of or may become possessed of after such Desertion, against her Husband and his Creditors, and any Person claiming under him; and the Judge Ordinary shall exercise in respect of every such Application all the Powers conferred upon the Court for Divorce and Matrimonial Causes under the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, Section Twenty-one.

Provisions respecting Property of Wife to extend to Property vested in her as Executrix, &c. VII. The Provisions contained in this Act and in the said Act of the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, respecting the Property of a Wife who has obtained a Decree for Judicial Separation or an Order for Protection, shall be deemed to extend to Property to which such Wife has become or shall become entitled as Executrix, Administratrix, or Trustee since the Sentence of Separation or the Commencement of the Desertion (as the Case may be); and the Death of the Testator or Intestate shall be deemed to be the Time when such Wife became entitled as Executrix or Administratrix.

Order for Protection of Earnings, &c., of Wife to be deemed valid. VIII. In every Case in which a Wife shall under this Act or under the said Act of the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, have obtained an Order to protect her Earnings or Property, or a Decree for Judicial Separation, such Order or Decree shall, until reversed or discharged, so far as necessary for the Protection of any Person or Corporation who shall deal with the Wife, be deemed valid and effectual; and no Discharge, Variation, or Reversal of such Order or Decree shall prejudice or affect any Rights or Remedies which any Person would have had in case the same had not been so reversed, varied, or discharged in respect of any Debts, Contracts, or Acts of the Wife incurred, entered into, or done between the Times of the making such Order or Decree and of the Discharge, Variation, or Reversal thereof; and Property of or to which the Wife is possessed or entitled for an Estate in Remainder or Reversion at the Date of the Desertion or Decree (as the Case may be), shall be deemed to be included in the Protection given by the Order or Decree.

Order to state the IX. Every Order which shall be obtained by a Wife under the said Act of the Twentieth and Twenty-first *Victoria*,

Chapter Eighty-five, or under this Act, for the Protection of Time at which the Desertion commenced. her Earnings or Property, shall state the Time at which the Desertion commenced; and the Order shall, as regards all Persons dealing with such Wife in reliance thereon, be conclusive as to the Time when such Desertion commenced.

X. All Persons and Corporations who shall, in reliance on Indemnity to Corporations, &c., any such Order or Decree as aforesaid, make any Payment to, or permit any Transfer or Act to be made or done by, the making Wife who has obtained the same, shall, notwithstanding such Payments under Order or Decree may then have been discharged, reversed, or Orders afterwards reversed, varied, or the Separation of the Wife from her Husband may have ceased, or at some Time since the making of the Order or Decree been discontinued, be protected and indemnified in the same Way in all respects as if, at the Time of such Payment, Transfer, or other Act, such Order or Decree were valid and still subsisting without Variation in full Force and Effect, and the Separation of the Wife from her Husband had not ceased or been discontinued, unless at the Time of such Payment, Transfer, or other Act such Persons or Corporations had Notice of the Discharge, Reversal, or Variation of such Order or Decree, or of the Cessation or Discontinuance of such Separation.

XI. In all Cases now pending, or hereafter to be commenced in which, on the Petition of a Husband for a Divorce, Court may order the alleged Adulterer is made a Co-Respondent, or in which, Co-Respondent, on the Petition of a Wife, the Person with whom the Husband is alleged to have committed Adultery is made a Respondent, to be dismissed from the Suit, it shall be lawful for the Court, after the Close of the Evidence on the Part of the Petitioner, to direct such Co-Respondent or Respondent to be dismissed from the Suit, if it shall think there is not sufficient Evidence against him or her.

XII. Registrars, Surrogates, Commissioners for taking Persons administering Oaths in the Court of Chancery, and all other Persons now administering Oaths under the Act of Oaths under 20 & the Twentieth and Twenty-first Victoria, Chapter Seventy-seven, or under this Act, shall have Power to administer Oaths under the Act of the Twentieth and Twenty-first Victoria, Chapter Eighty-five. c. 77, to administer under 20 & 21 Vict. c. 85.



Bills of  
Proctors,  
Attorneys,  
&c., to be  
subject to  
Taxation.

XIII. The Bill of any Proctor, Attorney, or Solicitor, for any Fees, Charges, or Disbursements in respect of any Business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the full Court or before the Judge Ordinary, shall, as well between Proctor or Attorney or Solicitor and Client, as between Party and Party, be subject to Taxation by any One of the Registrars belonging to the Principal Registry of the Court of Probate, and the Mode in which any such Bill shall be referred for Taxation, and by whom the Costs of Taxation shall be paid, shall be regulated by the Rules and Orders to be made under the Act of the Twentieth and Twenty-first of *Victoria*, Chapter Eighty-five, and the Certificate of the Registrar of the Amount at which such Bill is taxed shall be subject to Appeal to the Judge of the said Court.

Power to  
enforce  
Decree as  
to Costs.

XIV. The Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Registrars of the Principal Registry of the Court of Probate, shall respectively, in any Case where an Ecclesiastical Court having Matrimonial Jurisdiction had, previously to the Commencement of the Act of the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, made any Order or Decree in respect of Costs, have the same Power of taxing such Costs, and enforcing Payment thereof, or of otherwise carrying such Order or Decree into effect, as if the Cause wherein such Decree was made had been originally commenced and prosecuted in the said Court for Divorce and Matrimonial Causes: Provided that in taxing any such Costs, or any other Costs incurred in Causes depending in any Ecclesiastical Court previously to the Commencement of the said recited Act, all Fees, Charges, and Expenses shall be allowed which might have been legally made, charged, and enforced according to the Practice of the Court of Arches.

Judge to  
exercise  
Power and  
Authority  
over Pro-  
ctors, &c.

XV. The Judge Ordinary of the Court for Divorce and Matrimonial Causes shall have and exercise over Proctors, Solicitors, and Attorneys practising in the said Court, the like Authority and Control as is now exercised by the Judges of any Court of Equity or of Common Law over Persons practising therein as Proctors, Solicitors, or Attorneys.

XVI. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes to appoint, by Commission under Seal of the Court, any Persons practising as Solicitors in the *Isle of Man*, in the *Channel Islands*, or any of them, to administer Oaths, and to take Declarations or Affirmations, to be used in the said Court; and such Persons shall be entitled from Time to Time to charge and take such Fees as any other Persons performing the same Duties in the Court for Divorce and Matrimonial Causes may charge and take.

Section XVII was repealed by 31 & 32 Vict. c. 77, s. 2.

XVIII. Where any Trial shall have been had by a Jury before the full Court or before the Judge Ordinary, or upon any Issue directed by the full Court or by the Judge Ordinary, it shall be lawful for the Judge Ordinary, subject to any Rules to be hereafter made, to grant a Rule Nisi for a new Trial, but no such Rule shall be made absolute except by the full Court.

XIX. So much of the Act of the Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, as authorizes Application to be made for Restitution of Conjugal Rights or for Judicial Separation by Petition to any Judge of Assize, and as relates to the Proceedings on such Petition, shall be and the same is hereby repealed.

XX. In Cases where it is necessary to obtain Affidavits, Declarations, or Affirmations to be used in the Court for Divorce and Matrimonial Causes from Persons residing in Foreign Parts out of Her Majesty's Dominions, the same may be sworn, declared, or affirmed before the Persons empowered to administer Oaths under the Act of the Sixth of *George* the Fourth, Chapter Eighty-seven, or under the Act of the Eighteenth and Nineteenth of *Victoria*, Chapter Forty-two; provided that in Places where there are no such Persons as are mentioned in the said Acts such Affidavits, Declarations, or Affirmations may be made, declared, and affirmed before any Foreign local Magistrate or other Person having Authority to administer an Oath there.

XXI. Affidavits, Declarations, and Affirmations to be used in the Court for Divorce and Matrimonial Causes may be

Commissioners  
may be  
appointed  
in the Isle  
of Man, &c.

Judge  
Ordinary  
may grant  
Rule Nisi  
for new  
Trial, &c.

So much of  
20 & 21  
Vict. c. 85,  
as to Ap-  
plications  
to Judges  
of Assize  
repealed.

Affidavits,  
before  
whom  
to be sworn  
when  
Parties  
making  
them  
reside in  
Foreign  
Parts.

Affidavits,  
before

whom to  
be sworn.

sworn and taken in *Scotland, Ireland, the Isle of Man, the Channel Islands*, or any Colony, Island, Plantation, or Place out of *England*, under the Dominion of Her Majesty, before any Court, Judge, Notary Public, or Person lawfully authorized to administer Oaths in such Country, Colony, Island, Plantation, or Place respectively, or, so far as relates to the *Isle of Man* and the *Channel Islands*, before any Commissary, Ecclesiastical Judge, or Surrogate who at the Time of the passing of the Act of last Session, Chapter Seventy-seven, was authorized to administer Oaths in the *Isle of Man* or in the *Channel Islands* respectively; and all Registrars and other Officers of the Court for Divorce and Matrimonial Causes shall take judicial Notice of the Seal or Signature, as the Case may be, of any such Judge, Notary Public, or Person, which shall be attached, suspended, or subscribed to any such Affidavit, Declaration, or Affirmation, or to any other Document.

Persons  
forging  
Seal or  
Signature  
guilty of  
Felony.

XXII. If any Person shall forge any such Seal or Signature as last aforesaid, or any Seal or Signature impressed, affixed, or subscribed under the Provisions of the said Act of the Sixth of *George* the Fourth, or of the said Act of the Eighteenth and Nineteenth of *Victoria*, to any Affidavit, Declaration, or Affirmation to be used in the Court for Divorce and Matrimonial Causes, or shall tender in Evidence any such Document as aforesaid with a false or counterfeit Seal or Signature thereto, knowing the same to be false or counterfeit, he shall be guilty of Felony, and shall upon Conviction be liable to Penal Servitude for the Term of his Life, or for any Term not less than Seven Years, or to be imprisoned, with or without Hard Labour, for any Term not exceeding Three Years nor less than One Year; and whenever any such Document has been admitted in Evidence by virtue of this Act, the Court or the Person who has admitted the same may, at the Request of any Party against whom the same is so admitted in Evidence, direct that the same shall be impounded, and be kept in the Custody of some Officer of the Court or other proper Person, for such Period and subject to such Conditions as to the said Court or Person shall seem meet; and every Person charged with committing any Felony

under this Act may be dealt with, indicted, tried, and, if convicted, sentenced, and his Offence may be laid and charged to have been committed, in the County, District, or Place in which he may be apprehended or be in Custody; and every Accessory before or after the Fact to any such Offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his Offence laid and charged to have been committed, in any County, District, or Place in which the principal Offender may be tried.

XXIII. Any Person who shall wilfully give false Evidence, or who shall wilfully swear, affirm, or declare falsely, in any Affidavit or Deposition made under the Authority of this Act before any Surrogate having Authority to administer Oaths under the Act of the Twentieth and Twenty-first *Victoria*, Chapter Seventy-seven, or before any Person who before the passing of the said Act was a Surrogate authorized to administer Oaths in any of the *Channel Islands*, or before any Person authorized to administer Oaths under this Act, shall be liable to the Penalties and Consequences of wilful and corrupt Perjury.

Persons taking a false Oath before a Surrogate guilty of Perjury.

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ANNO VICESIMO SECUNDO & VICESIMO TERTIO  
VICTORIÆ REGINÆ.

CAP. LXI.

An Act to make further Provision concerning the Court for Divorce and Matrimonial Causes.

[13th August, 1859.]

WHEREAS it is expedient to make further Provision concerning "The Court for Divorce and Matrimonial Causes," established by the Act of the Session holden in the Twentieth and Twenty-first Years of Her Majesty, Chapter Eighty-five: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords

20 & 21  
Vict. c. 85.

Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

**Judges of Queen's Bench, &c. to be Judges of Divorce Court.** I. In addition to the Judges mentioned in Section Eight of the said Act, all the Judges for the Time being of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, not already made Judges of the Court for Divorce and Matrimonial Causes, shall be Judges of such Court.

Section II was repealed by 23 & 24 Vict. c. 144, s. 4.

**Precedence of Judge Ordinary.** III. The Judge Ordinary shall have Place and Precedence in the said Court next after the Lord Chief Baron of Her Majesty's Court of Exchequer.

**The Court may make Orders as to Custody of Children after a final Decree of Separation.** IV. The Court after a final Decree of Judicial Separation, Nullity of Marriage, or Dissolution of Marriage, may upon Application (by Petition) for this Purpose make, from Time to Time, all such Orders and Provision with respect to the Custody, Maintenance, and Education of the Children the Marriage of whose Parents was the Subject of the Decree, or for placing such Children under the Protection of the Court of Chancery, as might have been made by such final Decree or by Interim Orders in case the Proceedings for obtaining such Decree were still pending; and all Orders under this Enactment may be made by the Judge Ordinary alone or with One or more of the other Judges of the Court.

20 & 21  
Vict. c. 85.

**As to Marriage Settlements of Parties after final Decree.** V. The Court after a final Decree of Nullity of Marriage or Dissolution of Marriage may inquire into the Existence of ante-nuptial or post-nuptial Settlements made on the Parties whose Marriage is the Subject of the Decree, and may make such Orders with reference to the Application of the whole or a Portion of the Property settled either for the Benefit of the Children of the Marriage or of their respective Parents as to the Court shall seem fit.

*See 41 Vict. c. 19, S. 3.*

**Husband and Wife competent to give Evidence.** VI. On any Petition presented by a Wife, praying that her Marriage may be dissolved by reason of her Husband having been guilty of Adultery coupled with Cruelty, or of Adultery coupled with Desertion, the Husband and Wife respectively shall be competent and compellable to give Evidence of or relating to such Cruelty or Desertion.

VII. The Right of Appeal to the House of Lords given by the Fifty-sixth Section of the recited Act shall extend to all Sentences and Final Judgments on Petitions under the Legitimacy Declaration Act, 1858. Extension  
of Right  
of Appeal.

ANNO VICESIMO TERTIO & VICESIMO QUARTO  
VICTORIÆ REGINÆ.

CAP. CXLIV.

An Act to amend the Procedure and Powers of the  
Court for Divorce and Matrimonial Causes.

[28th August, 1860.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to hear and determine all Matters arising in the said Court, and to exercise all Powers and Authority whatever which may now be heard and determined and exercised respectively by the full Court or by Three or more Judges of the said Court, the Judge Ordinary being One, or where the Judge Ordinary shall deem it expedient, in relation to any Matter which he might hear and determine alone by virtue of this Act, to have the Assistance of One other Judge of the said Court, it shall be lawful for the Judge Ordinary to sit and act with such One other Judge accordingly, and, in conjunction with such other Judge, to exercise all the Jurisdiction, Powers, and Authority of the said Court. The Judge  
Ordinary  
may  
exercise  
Powers  
now vested  
in the full  
Court.  
Judge  
Ordinary  
may call  
in the  
Assistance  
of One of  
the other  
Judges.

II. Provided always, That the Judge Ordinary may, where he shall deem it expedient, direct that any such Matter as aforesaid shall be heard and determined by the full Court ; and in addition to the Cases in which an Appeal to the full Court now lies from the Decision of the Judge Ordinary, Judge  
may direct  
any Matter  
to be heard  
by the full  
Court.

**Appeal to the full Court.** either Party dissatisfied with the Decision of such Judge sitting alone in granting or refusing any Application for a new Trial which by virtue of this Act he is empowered to hear and determine may, within Fourteen Days after the pronouncing thereof, appeal to the full Court, whose Decision shall be final.

Section III was repealed by 31 & 32 Vict. c. 77, s. 2.

**Regulation of the Sittings of the full Court.** IV. The Sittings of the full Court shall be holden during the Seventh and Five following Days of Sitting in each Term, and on such other Days as the Judge Ordinary, with the Assent of the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, shall from Time to Time appoint; and the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer shall, by a Rota or otherwise, as they deem most convenient, make Provision for the Attendance of the requisite Number of such Judges to make with the Judge Ordinary a full Court during such Sittings; and Section Two of the Act of the last Session of Parliament, Chapter Sixty-one, shall be repealed.

22 & 23  
Vict. c. 61,  
s. 2,  
repealed.

**Court may, where One Party only appears, require Counsel to be appointed to argue on the other Side.** V. In every Case of a Petition for a Dissolution of Marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary Papers in the Matter to be sent to Her Majesty's Proctor, who shall, under the Directions of the Attorney General, instruct Counsel to argue before the Court any Question in relation to such Matter, and which the Court may deem it necessary or expedient to have fully argued; and Her Majesty's Proctor shall be entitled to charge and be reimbursed the Costs of such Proceeding as Part of the Expense of his Office.

20 & 21  
Vict. c. 85,  
s. 45,  
amended. VI. And whereas by Section Forty-five of the Act of the Session holden in the Twentieth and Twenty-first Years of Her Majesty, Chapter Eighty-five, it was enacted, that "In any Case in which the Court should pronounce a Sentence of Divorce or Judicial Separation for Adultery of the Wife, if it should be made appear to the Court that the Wife was entitled to any Property, either in possession or reversion, it should be lawful for the Court, if it should think proper,

"to order such Settlement as it should think reasonable to be made of such Property, or any Part thereof, for the Benefit of the innocent Party and of the Children of the Marriage, or either of them:" Be it further enacted, That any Instrument executed pursuant to any Order of the Court made under the said Enactment before or after the passing of this Act, at the Time of or after the pronouncing of a final Decree of Divorce or Judicial Separation, shall be deemed valid and effectual in the Law, notwithstanding the Existence of the Disability of Coverture at the Time of the Execution thereof.

VII. Every Decree for a Divorce shall in the first instance be a Decree Nisi, not to be made absolute till after the Expiration of such Time, not less than Three Months from the pronouncing thereof, as the Court shall by General or Special Order from Time to Time direct; and during that Period any Person shall be at liberty, in such Manner as the Court shall by General or Special Order in that Behalf from Time to Time direct, to show Cause why the said Decree should not be made absolute by reason of the same having been obtained by Collusion or by reason of material Facts not brought before the Court; and, on Cause being so shown, the Court shall deal with the Case by making the Decree absolute, or by reversing the Decree Nisi, or by requiring further Inquiry, or otherwise as Justice may require; and at any Time during the Progress of the Cause or before the Decree is made absolute any Person may give Information to Her Majesty's Proctor of any Matter material to the due Decision of the Case, who may thereupon take such Steps as the Attorney General may deem necessary or expedient; and if from any such Information or otherwise the said Proctor shall suspect that any Parties to the Suit are or have been acting in collusion for the Purpose of obtaining a Divorce contrary to the Justice of the Case, he may, under the Direction of the Attorney General, and by Leave of the Court, intervene in the Suit, alleging such Case of Collusion, and retain Counsel and subpoena Witnesses to prove it; and it shall be lawful for the Court to order the Costs of such Counsel and Witnesses, and otherwise, arising from such



Intervention, to be paid by the Parties or such of them as it shall see fit, including a Wife if she have separate Property; and in case the said Proctor shall not thereby be fully satisfied his reasonable Costs, he shall be entitled to charge and be reimbursed the Difference as Part of the Expense of his Office.

*See 45 Vict. c. 19, S. 2.*

Continu-  
ance of  
Act.

VIII. This Act shall continue in force until the Thirty-first Day of *July* One thousand eight hundred and sixty-two, and no longer.

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ANNO VICESIMO QUINTO & VICESIMO SEXTO  
VICTORIÆ REGINÆ.

CAP. LXXXI.

An Act to make perpetual An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes. [7th August, 1862.]

23 & 24  
Vict.  
c. 144.

WHEREAS an Act passed in the Session of Parliament held in the Twenty-third and Twenty-fourth Years of the Reign of Her Majesty, Chapter One hundred and forty-four, and intituled *An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes*, is about to expire; and it is expedient to make the same perpetual: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same:

Recited  
Act made  
perpetual.

I. There shall be repealed the Eighth Section of the said Act, whereby it is provided that the same is to continue in force until the Thirty-first Day of *July* One thousand eight hundred and sixty-two and no longer, and the said Act shall be and is hereby made perpetual.

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ANNO VICESIMO SEPTIMO & VICESIMO  
OCTAVO VICTORIÆ REGINÆ.

CAP. XLIV.

An Act to amend the Act relating to Divorce and Matrimonial Causes in *England*, Twentieth and Twenty-first *Victoria*, Chapter Eighty-five.

[14th July, 1864.]

WHEREAS it is expedient to amend an Act passed in the Twentieth and Twenty-first Years of the Reign of Her present Majesty, Chapter Eighty-five: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. Where under the Provisions of Section Twenty-one of the said Act a Wife deserted by her Husband shall have obtained or shall hereafter obtain an Order protecting her Earnings and Property from a Police Magistrate, or Justices in Petty Sessions, or the Court for Divorce and Matrimonial Causes, as the Case may be, the Husband and any Creditor or other Person claiming under him may apply to the Court or to the Magistrate or Justices by whom such Order was made for the Discharge thereof as by the said Act authorized; and in case the said Order shall have been made by a Police Magistrate and the said Magistrate shall have died or been removed, or have become incapable of acting, then in every such Case the Husband or Creditor, or such other Person as aforesaid, may apply to the Magistrate for the Time being acting as the Successor or in the Place of the Magistrate who made the Order of Protection, for the Discharge of it, who shall have Authority to make an Order discharging the same; and an Order for Discharge of an Order for Protection may be applied for to and be granted by the Court, although the Order for Protection was not made by the Court, and an Order for Protection made at One Petty Sessions may be discharged by the Justices of any later Petty Sessions, or by the Court.

Amending  
Provisions  
of 20 & 21  
Vict. c. 85,  
as to  
Orders of  
Protection  
of Pro-  
perty of  
Wife  
deserted  
by her  
Husband.

## ANNO VICESIMO NONO VICTORIÆ REGINÆ.

## CAP. XXXII.

An Act further to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[11th June, 1866.]

20 & 21  
Vict. c. 85. WHEREAS by the Act passed in the Session of Parliament holden in the Twentieth and Twenty-first Years of the Reign of Her present Majesty, intituled *An Act to amend the Laws relating to Divorce and Matrimonial Causes in England*, it is by the Thirty-second Section enacted, "that the Court may, "on pronouncing any Decree for a Dissolution of Marriage, "order that the Husband shall to the Satisfaction of the "Court secure to the Wife such gross or annual Sum of "Money as to the Court may seem reasonable, and for that "Purpose may refer it to One of the Conveyancing Counsel "of the Court of Chancery to settle and approve of a proper "Deed to be executed by all necessary Parties:"

And whereas it sometimes happens that a Decree for a Dissolution of Marriage is obtained against a Husband who has no Property on which the Payment of any such gross or annual Sum can be secured, but nevertheless he would be able to make a monthly or weekly Payment to the Wife during their Joint Lives:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Power to order monthly or weekly Payments to Wife from Husband on Dissolution of Marriage. 1. In every such Case it shall be lawful for the Court to make an Order on the Husband for Payment to the Wife during their joint Lives of such monthly or weekly Sums for her Maintenance and Support as the Court may think reasonable: Provided always, that if the Husband shall afterwards from any Cause become unable to make such Payments it shall be lawful for the Court to discharge or modify the Order, or temporarily to suspend the same as to the whole or

any Part of the Money so ordered to be paid, and again to revive the same Order, wholly or in part, as to the Court may seem fit.

2. In any Suit instituted for Dissolution of Marriage, if the Respondent shall oppose the Relief sought on the Ground, in case of such a Suit instituted by a Husband, of his Adultery, Cruelty, or Desertion, or in case of such a Suit instituted by a Wife, on the Ground of her Adultery or Cruelty; the Court may in such Suit give to the Respondent, on his or her Application, the same Relief to which he or she would have been entitled in case he or she had filed a Petition seeking such Relief.

In Cases of Opposition on certain Grounds.

3. No Decree Nisi for a Divorce shall be made absolute until after the Expiration of Six Calendar Months from the pronouncing thereof, unless the Court shall under the Power now vested in it fix a shorter Time.

Decree Nisi not absolute till after Six Months.

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ANNO TRICESIMO PRIMO & TRICESIMO  
SECUNDO VICTORIÆ REGINÆ.

CAP. LXXVII.

An Act to amend the Law relating to Appeals from the Court of Divorce and Matrimonial Causes in *England*.

[31st July, 1868.]

WHEREAS it is expedient to amend the Law relating to Appeals from the Court for Divorce and Matrimonial Causes with a view to prevent unnecessary Delay in the final Determination of Suits for Dissolution or Nullity of Marriage:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. Throughout this Act the Expression "the Court" shall mean the Court for Divorce and Matrimonial Causes.

Interpretation.

8. 56 of  
20 & 21  
Vict. c. 85,  
F. 17 of  
21 & 22  
Vict.  
c. 108, S. 3  
of 23 & 24  
Vict.  
c. 144,  
repealed.

2. Section Fifty-six of the Act of Twentieth and Twenty-first *Victoria*, Chapter Eighty-five, Section Seventeen of the Act of Twenty-first and Twenty-second *Victoria*, Chapter One hundred and eight, and Section Three of the Act of Twenty-third and Twenty-fourth *Victoria*, Chapter One hundred and forty-four, are hereby repealed.

Appeals  
to House  
of Lords.

8. Either Party dissatisfied with the final Decision of the Court on any Petition for Dissolution or Nullity of Marriage may, within One Calendar Month after the pronouncing thereof, appeal therefrom to the House of Lords, and on the Hearing of any such Appeal the House of Lords may either dismiss the Appeal or reverse the Decree, or remit the Case to be dealt with in all respects as the House of Lords shall direct: Provided always, that in Suits for Dissolution of Marriage no Respondent or Co-Respondent, not appearing and defending the Suit on the Occasion of the Decree Nisi being made, shall have any Right of Appeal to the House of Lords against the Decree when made absolute, unless the Court, upon Application made at the Time of the pronouncing of the Decree absolute, shall see fit to permit an Appeal.

No Appeal  
in unde-  
fended  
Suits for  
Dissolu-  
tion unless  
by Leave  
of Court.

Liberty to  
Parties to  
marry  
again.

4. Section Fifty-seven of the said Act of Twenty-first *Victoria*, Chapter Eighty-five, shall be read and construed with reference to the Time for appealing as varied by this Act; and in Cases where under this Act there shall be no Right of Appeal, the Parties respectively shall be at liberty to marry again at any Time after the pronouncing of the Decree absolute.

Short  
Title.

5. This Act may be cited as "The Divorce Amendment Act, 1868."

Qualified  
retro-  
spective  
Operation.

6. This Act shall extend to all Suits pending at the Time when the same shall come into operation, notwithstanding that a Decree may have been pronounced therein; provided nevertheless, that this Act shall not affect any pending Appeal, nor shall the same prejudice any subsisting Right of Appeal against a Decree already pronounced, provided such Appeal be lodged within One Calendar Month after this Act shall come into operation.

## 36 VICT. CH. 31.

An Act to extend to Suits for Nullity of Marriage the <sup>A.D. 1873.</sup>  
Law with respect to the Intervention of Her Majesty's  
Proctor and others in Suits in England for dissolving  
Marriages. [16th June, 1873.]

WHEREAS under section seven of the Act of the session of the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter one hundred and forty-four, intituled "An Act to amend the procedure and powers of the Court for Divorce and Matrimonial Causes," and under section three of the Act of the session of the twenty-ninth and thirtieth years of the reign of Her present Majesty, chapter thirty-two, intituled "An Act further to amend the procedure and powers of the Court for Divorce and Matrimonial Causes," a decree for divorce is required in the first instance to be a decree nisi, and not to be made absolute until after the expiration of six months, unless the court otherwise direct, and provision is made for any person showing cause why the decree should not be made absolute by reason of the same having been obtained by collusion, or of material facts not having been brought before the court, and power is given to any person to give information to Her Majesty's proctor, who is thereupon authorized to take such steps as the Attorney General may deem necessary or expedient, and such proctor, if he suspects that any parties to the suit are acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, is authorized under the direction of the Attorney General and by leave of the court to intervene in the suit, and otherwise proceed as therein mentioned, and provision is made for the payment of his costs in so acting :

And whereas it is expedient to extend such provisions to a suit for nullity of marriage :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords

Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

**Extension of s. 7 of 23 & 24 Vict. c. 144, s. 3 of 29 & 30 Vict. c. 32, to suits for nullity of marriage.** 1. The above-mentioned sections of the said Acts shall extend to decrees and suits for nullity of marriage in like manner as they apply to decrees and suits for divorce, and shall be construed as if they were herein enacted, with the substitution of the words "a decree for nullity of marriage" for the words "decree for a divorce" or "divorce," as the case may require.

**Short title.** 2. This Act, together with the Acts specified in the Schedule to this Act, may be cited as "The Matrimonial Causes Acts, 1857 to 1873," and each Act may be cited as the Matrimonial Causes Act of the year in which it was passed.

## SCHEDULE.

### MATRIMONIAL CAUSES ACTS.

Session and Chapter.	Title.
20 & 21 Vict. c. 85. -	An Act to amend the law relating to Divorce and Matrimonial Causes in England.
21 & 22 Vict. c. 108. -	An Act to amend the Act of the twentieth and twenty-first Victoria, chapter eighty-five.
22 & 23 Vict. c. 61. -	An Act to make further provision concerning the Court for Divorce and Matrimonial Causes.
23 & 24 Vict. c. 144. -	An Act to amend the procedure and powers of the Court for Divorce and Matrimonial Causes.
29 & 30 Vict. c. 32. -	An Act further to amend the procedure and powers of the Court for Divorce and Matrimonial Causes.
31 & 32 Vict. c. 77. -	An Act to amend the law relating to appeals from the Court for Divorce and Matrimonial Causes in England.

## 41 VICT. CH. 19.

## An Act to amend the Matrimonial Causes Acts.

A.D. 1878.

[27th May, 1878.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as the Matrimonial Causes Act, Short title. 1878.

2. Where the Queen's proctor or any other person shall intervene or show cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just ; and the Queen's proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases : Provided that the Treasury may, if it shall think fit, order any costs which the Queen's proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office.

Costs of  
intervention.

3. The Court may exercise the powers vested in it by the provisions of section five of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage.

Extension  
of power  
given by  
22 & 23  
Vict. c. 61,  
s. 5.

4. If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute twenty-fourth and twenty-fifth Victoria, chapter one hundred, section forty-three, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband ; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty ; and such order may further provide,

If husband  
convicted  
of aggra-  
vated as-  
sault,  
Court may  
order that  
wife be not  
bound to  
cohabit,



1. That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the Court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made;
2. That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.

Provided always, that no order for payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.

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## RULES AND REGULATIONS.

WHEREAS by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided that the said Court shall make such rules and regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same; and whereas by another Act passed in the Session of Parliament holden in the Twenty-third and Twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever hitherto exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do revoke all rules and regulations heretofore made and issued concerning the practice and procedure in the said Court for Divorce and Matrimonial Causes, and do make the following rules and regulations in place thereof, to take effect on and after the 11th January, 1866.

Dated the Twenty-sixth day of December, 1865.

(Signed) JAMES PLAISTED WILDE.

RULES AND REGULATIONS  
FOR  
HER MAJESTY'S COURT FOR DIVORCE  
AND MATRIMONIAL CAUSES,  
MADE UNDER THE PROVISIONS OF

20 & 21 Vict. Cap. 85.	25 & 26 Vict. Cap. 81.
21 & 22 Vict. Cap. 108.	27 & 28 Vict. Cap. 44.
22 & 23 Vict. Cap. 61.	AND
23 & 24 Vict. Cap. 144.	21 & 22 Vict. Cap. 93.

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All rules and regulations heretofore made and issued for Her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th day of January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in Her Majesty's Court for Divorce and Matrimonial Causes on and after the 11th day of January, 1866.

*Petition.*

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.—See Form of Petition, No. 1.

2. Every petition shall be accompanied by an affidavit made by the Petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the petition.

3. In cases where the Petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage,

the Petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the Petitioner and the other party to the marriage or alleged marriage.

*Co-respondents.*

4. Upon a husband filing a petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made Co-respondents in the cause, unless the Judge Ordinary shall otherwise direct.

5. Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the Petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the Registrars to amend the petition by inserting such name therein, and the Registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "Respondent" where the same is herein-after used shall include all Co-respondents so far as the same is applicable to them.

*Citation.*

8. Every Petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each Respondent in the cause.—See Form of Citation, No. 2.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there deposit the præcipe and get the citation signed and sealed.—See Form of Præcipe, No. 3. The address given in the Præcipe must be within three miles of the General Post Office.

*Service.*

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court.

13. In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the Registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the Registry.—See Form of Certificate of Service, No. 4.

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the Registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a Petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the Respondents, or it must be shown by affidavit, filed in the Registry, that they have been duly cited, and have not appeared.

18. An affidavit of service of a citation must be substantially in the form, No. 5, and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

#### *Appearance.*

19. All appearances to citations are to be entered in the Registry in a book provided for that purpose.—See Form of Entry of Appearance, No. 6.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as herein-after directed, or by leave of the Judge Ordinary, or of the Registrars in his absence, to be applied for by motion founded on affidavit.

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office.

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the Registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the Petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

*Interveners.*

23. Application for leave to intervene in any cause must be made to the Judge Ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge Ordinary.

*Suits in formâ Pauperis.*

25. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the Judge Ordinary; and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

*Answer.*

28. Each Respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the Registry an answer to the petition.—See Form of Answer, No. 7.

29. Each Respondent shall on the day he or she files an answer, deliver a copy thereof to the Petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the Respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof, and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the Respondent who is husband or wife of the Petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the Deponent and the Petitioner.

*Further Pleadings*

32. Within fourteen days from the filing and delivery of the answer the Petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

*General Rules as to Pleadings.*

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the Judge Ordinary, or of one of the Registrars in his absence, obtained on summons.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the Registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the Judge Ordinary, or of one of the Registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the Judge Ordinary or Registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the Registrars in his absence, by summons, and not by motion.

*Service of Pleadings, &c.*

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

*Mode of Trial.*

40. When the pleadings on being concluded have raised any questions of fact, the Petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that



time, on the next day appointed for hearing motions in this Court, or in case the Petitioner should fail to do so at such time, either of the Respondents on whose behalf such questions have been raised, may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

*Questions of Fact for the Jury.*

41. Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the Petitioner, and settled by one of the Registrars.—See Form, No. 8.

42. Should the Petitioner fail to prepare and deposit the questions for settlement in the Registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the Respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the Registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

*Setting down the Cause for Trial or Hearing.*

44. In cases to be tried by a jury, the Petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as are finally settled in the Registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

45. In cases to be heard without a jury, the Petitioner shall, after obtaining directions as to the mode of hearing,

set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

46. If the Petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the Respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the Petitioner, and to each of the other parties to the cause for whom an appearance has been entered.

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the Registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct.

*Trial or Hearing.*

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit.

49. The Registrar shall enter in the Court Book the finding of the jury and the decree of the Court, and shall sign the same.

50. Either of the Respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a Respondent, who is husband or wife of the Petitioner, may be heard also in respect to any question as to custody of children, but a Respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

*Evidence taken by Affidavit.*

51. When the Judge Ordinary has directed that all or any

of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the Registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge Ordinary, or of the Registrars in his absence.

55. Application for an order for the attendance of a Deponent for the Purpose of being cross-examined in open Court shall be made to the Judge Ordinary, on summons.

*Proceedings by Petition.*

56. Any party to a cause who has entered an appearance may apply on summons to the Judge Ordinary, or in his absence to the Registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the Registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the Registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded.

59. See form of act on petition, answer, and conclusion, No. 9.

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the Registry such affidavits and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge Ordinary without a jury.

*New Trial and Hearing.*

62. An application to the Judge Ordinary for a new trial of issues of fact tried by a jury, or for a re-hearing of a cause, may be made by motion within fourteen days from the day on which the issues were tried or the cause was heard, if the Judge Ordinary be then sitting to hear motions, if not, on the first day appointed for hearing motions in this Court after the expiration of the fourteen days.

*Petition for reversal of Decree of Judicial Separation.*

63. A Petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the Petitioner relies.—See Form of Petition, No. 10.

64. Before such a Petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such a Petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the Registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original Petition for judicial separation, and answer thereto, so far as such directions are applicable.

*Demurrer.*

67. All demurrers are to be set down for hearing in the

same manner as causes, and will come on in their turn with other causes to be heard by the Judge Ordinary without a jury, unless the Judge Ordinary shall direct otherwise.

*Intervention of the Queen's Proctor.*

68. The Queen's Proctor shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition; and on the day he files his plea in the Registry shall deliver a copy thereof to the Petitioner, or to his proctor, solicitor, or attorney.

69. All subsequent pleading and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause.

*Showing Cause against a Decree.*

70. Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such decree nisi has been pronounced.

71. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies.

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree nisi has been pronounced.

73. The party in the cause in whose favour the decree nisi has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person showing cause against the decree being made absolute.

74. The person showing cause against the decree nisi being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree nisi.

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge Ordinary or of one of the Registrars in his absence.

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge Ordinary may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

*Appeals to the full Court.*

77. An appeal to the full Court from a decision of the Judge Ordinary must be asserted in writing and the instrument of appeal filed in the Registry within the time allowed by law for appealing from such decision; and on the same day on which the appeal is filed, notice thereof, and a copy of the appeal, shall be delivered to each Respondent in the appeal, or to his or her proctor, solicitor, or attorney.—See Form of Instrument of Appeal, No. 11.

78. The Appellant within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge Ordinary, or by the Registrars in his absence, shall file in the Registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each Respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten days from the time of such filing and delivery or from such further time as may be allowed for the purpose by the Judge Ordinary, or the Registrars in his absence, shall be at liberty to file in the Registry a case against the appeal, also in triplicate, and the Respondent shall on the same day deliver a copy thereof to the Appellant, or to his proctor, solicitor, or attorney.

79. After the expiration of ten days from the time when the Respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed.

*Decree absolute.*

80. All applications to make absolute a decree nisi for dissolution of a marriage must be made to the Court by motion.

In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the Registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shown by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree nisi.—See Form of Affidavit, No. 12.

*Alimony.*

81. The wife, being the Petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the Respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

83. See Form of Petition for Alimony, No. 13.

84. The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being Respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon.

87. In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation; but the husband is not at

liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the Registrars in his absence.

88. A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice.

90. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the Registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by



these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge Ordinary, or of the full Court on appeal, as the case may be.

94. Alimony, pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

*Maintenance and Settlements.*

95. Applications to the Court to exercise the authority given by Sections 32 and 45 of 20 & 21 Vict. c. 85, and by Section 5 of the 22 and 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the Judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under Section 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree nisi has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party

to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the Registrars, who shall investigate the averments therein contained, in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

102. The report of the Registrar shall be filed in the Registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the Registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the Registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge Ordinary.

*Custody of and Access to Children.*

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit.

*Guardians to Minors.*

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as Petitioner, Respondent, or Intervener in a cause.—See Form of an Instrument of Election, No. 14.

106. The necessary instrument of election must be filed in the Registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the Registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a Co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

*Subpœnas.\**

109. Every subpœna shall be written or printed on parchment and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the Registry, and there get it signed and sealed, and there deposit the præcipe.

\* And see Rule, 180, and Forms of Subpœna, Nos. 15, 17, and Forms of Præcipe, Nos. 16, 18.

*Writs of Attachment and other Writs.*

110. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the Judge Ordinary by motion in Court.

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained,

and taken to the Registry, with an office copy of the order, and, when approved and signed by one of the Registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge Ordinary or for other Judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge Ordinary if the Court be then sitting; if not, then to one of the Registrars, who for good cause shown shall have power to order such discharge.

*Notices.*

113. All notices required by these Rules and Regulations, or by the practice of the Court, shall be in writing, and signed by the party or by his or her proctor, solicitor, or attorney.

*Service of Notices, &c.*

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these rules and regulations are required to be given or delivered to the opposite parties in the cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the Petitioner and Respondent respectively.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the Registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party

who obtained it, unless the Judge Ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the Commissioner or other person before whom the affidavit is sworn.

*Office Copies, Extracts, &c.*

118. The Registrars of the Principal Registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes; and all Rules and Orders, and Fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the Registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial Causes, save that the length of copies and extracts shall in all cases be computed at the rate of 72 words per folio.

119. Office copies or extracts furnished from the Registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the Principal Registrars of the Court of Probate to be an Examined Copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

*Time fixed by these Rules.*

121. The Judge Ordinary shall in every case in which a time is fixed by these Rules and Regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such

qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the Registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in Chambers.

123. The time fixed by these Rules and Regulations for the performance of any act or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

*Protection Orders.*

124. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in Chambers, and supported by affidavit.—See Form of Application, No. 19.

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

*Bond not required.*

126. On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

*Change of Proctor, Solicitor, or Attorney.*

127. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the Judge Ordinary, or to the Registrars in his absence.

128. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time

required by the order served upon him, the party may, with the sanction and by order of the Judge Ordinary or of the Registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

*Order for the immediate Examination of a Witness.*

129. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the Judge Ordinary, or to the Registrars in his absence, by summons, or if on behalf of a Petitioner proceeding in default of appearance of the parties cited in the cause without summons before one of the Registrars, who will direct the order to issue, or refer the application to the Judge Ordinary, as he may think fit.

130. Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the Judge Ordinary or by the Registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the Judge Ordinary or the Registrars to whom the application is made for the order shall direct a shorter notice to be given.

*Commissions and Requisitions for Examination of Witnesses.*

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a Petitioner proceeding in default of appearance without summons, before one of the Registrars, who will order such commission or requisition to issue, or refer the application to the Judge Ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated

and agreed upon by the parties in the cause, and approved of by the Registrar, or for want of agreement to be nominated by the Registrar to whom the application is made.

134. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the Registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the Registrar shall make an order on such application, or refer the matter to the Judge Ordinary.—See Form of a Commission and Requisition, No. 20.

135. Any of the parties to the cause may apply to one of the Registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the Registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge Ordinary.

136. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the Registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the Registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the Registry, unless the Judge Ordinary or one of the Registrars in his absence shall otherwise direct.



*Affidavits.*

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

140. No affidavit will be admitted in any matter depending in the Court for Divorce and Matrimonial Causes in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the Registrar, Commissioner, or authority before whom it was sworn.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the Registrar, Commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark or wrote his or her signature thereto in the presence of the Registrar, Commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the Rules and Regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

146. The above Rules and Regulations in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.

*Cases for Motion.*

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the Registry without permission of one of the Registrars.

149. On depositing the case in the Registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the Registry; or in case such affidavits or documents have been already filed or deposited in the Registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary.

150. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit who are entitled to be heard in opposition thereto.

*Taxing Bills of Costs.*

151. All bills of costs are referred to the Registrars of the Principal Registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the Registry.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a Registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the Registrar.

#### *Wife's Costs.*

*Rule 158 was revoked, and a new rule substituted. See post, Amended and Additional Rules, July, 1875, p. 329.*

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the Jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband,

except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

*Summonses.*

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the Summons Book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p.m. On Saturdays the copy of the summons is to be served before 2 o'clock p.m.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the Judge's Chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge Ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the Registrars in the Summons Book.

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge Ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge Ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the Registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the Registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary: provided that the order sought is in the opinion of the Registrar one which, under the circumstances, would be made by the Judge Ordinary.

168. The same Rules and Regulations shall, so far as applicable, be observed in respect to summonses which may be heard and disposed of by the Registrars.

*Payment of Money out of Court.*

169. Persons applying for payment of money out of Court are to bring into the Registry a notice in writing setting forth the day on which the money applied for was paid into the Registry, the minute entered in the Court books on receiving the same, the date and particulars of the order for payment to the applicant. In case the money applied for be in payment of costs, the notice must also set forth the date of filing the bill for taxation, and of the Registrar's certificate.

170. The above notice must be deposited in the Registry two clear days at least before the money is paid out, and is, in that interval, to be examined by one of the Clerks of the Registry with the original entries in the Court books, and the bills of costs referred to in it, and certified by such Clerk to be correct.

171. When the Court is not sitting, payment of money out of Court will be made only on such day or days of the week as may be fixed by the Registrars, notice whereof will be given in the Registry.

*Registries and Officers.*

172. The Registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the Registrars of the Principal Registry of the Court of Probate.

173. The Record Keepers, the Sealer, and other officers of the Principal Registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the Registry thereof, as they discharge in the Court of Probate and the Principal Registry thereof.

*Proceedings under the "Legitimacy Declaration Act, 1858."*

174. The above Rules and Regulations, so far as the same may be applicable, shall extend to applications and proceedings under the "Legitimacy Declaration Act, 1858."

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ADDITIONAL RULES AND REGULATIONS.

*Restitution of Conjugal Rights.*

175. The Affidavit filed with the Petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the Registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the Petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights has been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights the Respondent may apply by summons to the Judge, or to the Registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the Petitioner.

*As to Costs.*

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the Registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for

moving for a new trial or re-hearing shall have expired; or, in case a rule nisi should have been granted, until the rule is disposed of, unless the Judge Ordinary shall, for cause shown, direct a more speedy taxation.

178. Upon the Registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by attachment on the party himself], and if the costs be not paid within the seven days a writ of Fieri Facias or writ of sequestration shall be issued as of course in the Registry, upon an affidavit of service of the order, and non-payment.

*As to Subpœnas.*

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness. See Forms 15, 17, *post*, pp. 353, 354.

## ADDITIONAL AND AMENDED RULES AND REGULATIONS.

181. All summonses heretofore heard by the Registrars of the Principal Registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the Registrars, at the Principal Registry of that Court, during the period appointed for the sittings of the Court at Westminster, as well as in the Judge's absence.

182. All rules and regulations in respect to summonses now heard before the Judge Ordinary in Chambers at Westminster, shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the Registrars at the Principal Registry.

183. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge Ordinary.

184. Any person heard on the summons objecting to the order so issued under the direction of the Registrars may, subject to any order as to costs, apply to the Judge Ordinary on summons to rescind or vary the same.



AMENDED AND ADDITIONAL RULES AND  
REGULATIONS  
FOR  
HER MAJESTY'S COURT FOR DIVORCE  
AND MATRIMONIAL CAUSES.

WHEREAS by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided that the said Court shall make such rules and regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever thentofore exercised by the full Court.

Now I, The Right Honourable Sir James Hannen, Knight, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do make the following amended and additional rules and regulations concerning the practice and procedure in the said Court for Divorce and Matrimonial Causes, to take effect on and after the 21st day of July, 1875.

(Signed) JAMES HANNEN.

Dated the 14th July, 1875.

AMENDED AND ADDITIONAL RULES AND  
REGULATIONS  
FOR  
HER MAJESTY'S COURT FOR DIVORCE  
AND MATRIMONIAL CAUSES.

*Amended Rule.*

Rule 158 of the Rules and Regulations for this Court bearing date 26th December, 1865, is revoked, save so far as concerns any thing done or proceeding taken in accordance with it, and the form of Bond therein referred to as given in the Appendix No. 21 is to be discontinued, and in place of Rule 158 it is ordered that the following Rule shall take effect.

*Wife's Costs.*

158. After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the Judge Ordinary or of the Registrars, to be obtained on summons, a wife who is Petitioner, or has entered an appearance as Respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the Registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the Registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the Registrar; provided that in case the husband should by reason of his wife having separate property, or for other reasons, dispute her right to

recover any costs pending suit against him, the Registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

The Bond to secure the wife's costs shall be in the following form as nearly as the circumstances of the case will allow :

No. 21.—*Bond for securing Wife's Costs.*

Know all men by these presents, that We, *A.B.* of *&c.*, *G.H.* of *&c.*, and *K.L.* of *&c.*, are held and firmly bound unto *X.Y.* of \_\_\_\_\_ the Proctor or Solicitor for \_\_\_\_\_, of \_\_\_\_\_, in the penal sum of \_\_\_\_\_ pounds of good and lawful money of Great Britain, to be paid to the said *X.Y.*, and for which payment to be well and truly made we bind ourselves and each of us for the whole, our heirs, executors, or administrators firmly by these presents. Sealed with our seals.

Dated the \_\_\_\_\_ day of \_\_\_\_\_  
in the year of our Lord 18 \_\_\_\_\_.

Whereas a certain cause is now depending in Her Majesty's Court for Divorce and Matrimonial Causes between the said *A.B.*, Petitioner of the one part, and the said *C.D.*, Respondent, and *E.F.*, Co-Respondent, of the other part. And whereas by an order made in the said cause, it was ordered that the said *A.B.*, the Petitioner [*or the said C.D.*, the Respondent] should within \_\_\_\_\_ days from the service thereof pay or cause to be paid into the Registry of the Court of Probate the sum of \_\_\_\_\_ pounds to cover the costs of the said Respondent [*or Petitioner*] of and incidental to the hearing of the said cause, or file in the said Registry a bond under the hand and seal of the said *A.B.*, and of two sufficient sureties in the penal sum of \_\_\_\_\_ pounds, conditioned for the payment of such costs of the said *C.D.* as shall be certified to be due and payable by the said *A.B.*, not exceeding the said sum of \_\_\_\_\_ pounds as security for the costs

aforesaid. Now the condition of this obligation is such that if the above-bounden *A.B.*, his heirs, executors, or administrators shall well and truly pay or cause to be paid to the above-named *X.Y.*, his heirs, executors, administrators, or assigns the full sum of                      of good and lawful money of Great Britain, or the lawful costs of the said *C.D.*, the Respondent [*or* Petitioner] of and incidental to the hearing and trial of this cause to the extent of                      pounds, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Sealed and delivered by the said *A.B.*,  
*G.H.*, and *K.L.*, in the presence  
of

*A.B.* (L.S.)  
*G.H.* (L.S.)  
*K.L.* (L.S.)

*One attesting witness.*

## ADDITIONAL RULES AND REGULATIONS.

*Appearance.*

185. Application for leave to enter an appearance after a proceeding has been taken in default heretofore made to the Judge Ordinary on motion in pursuance of Rule 20 shall hereafter be made by Summons before one of the Registrars.

*Answer.*

186. In case the time allowed for Entry of appearance to a Citation should be more than eight days after service thereof, a Respondent who has entered an appearance may, within fourteen days from the expiration of the time allowed for the entry of appearance, file in the Registry an answer to the petition.

*General Rule as to Pleadings.*

187. Either of the parties before the Court desiring to alter or amend a pleading may apply by Summons to one of the Registrars for an order for that purpose.

*Evidence taken by Affidavit.*

188. In an undefended Cause when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the Registry at any time up to ten clear days before the cause is heard.

*Alimony.*

189. Application for an order for a further and fuller answer to a Petition for Alimony, heretofore made to the Judge Ordinary on motion in pursuance of Rule 86, shall hereafter be made by Summons before one of the Registrars.

190. A wife who has obtained a final decree of Judicial Separation, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree if no appeal be then pending, may apply to the Court by petition for an allotment of permanent Alimony though no Alimony shall have been allotted to her pending suit, and the Rules from 84 to 88, both inclusive, of the Rules and Regulations for this Court, bearing date 26th December, 1865, relating to Petitions for Alimony pending suit as varied by these and other Additional Rules and Regulations shall, so far as the same are applicable, be observed in respect to the proceedings upon such petitions for permanent Alimony.

191. All applications for an allotment of Alimony pending suit, and for an allotment of permanent Alimony heretofore made to the Court by motion in pursuance of Rules 89 and 91, shall hereafter be referred to one of the Registrars at the Principal Registry, who shall investigate the averments in the petition for Alimony, Answer, and Reply, in the presence of the parties, their Proctors, Solicitors, or Attorneys, and who, if he thinks fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit or refer the application, or any question arising out of it, to the Judge Ordinary for his decision.

192. Any person heard on the reference as to Alimony before one of the Registrars, objecting to the order issued under his direction, may (subject to any order as to costs) apply to the Judge Ordinary on Summons to rescind or vary the same.

*Dismissal of Petition.*

193. When an order has been made for the dismissal of a petition on payment of costs the cause will not be removed from the list of causes in the Court books without an order of one of the Registrars, to obtain which it must be shown to his satisfaction that the costs have been paid.

*Decree Absolute.*

194. In case application by motion to make absolute a Decree Nisi for the dissolution of a marriage should from any cause be deferred beyond six days from the time when the affidavit required by Rule 80 is filed with the case for motion it must be shown by further affidavit that search has been made in the proper books up to within six clear days of the motion for decree absolute being heard, and that at such time no person had obtained leave to intervene, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute, and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of any such person it must also be shown by such further affidavit what proceedings if any have been taken thereon.

*Custody, Maintenance, and Education of Children.*

195. Rules from 97 to 102, both inclusive, of the Rules and Regulations for this Court, bearing date 26th December, 1865, shall so far as the same are applicable be observed in respect to applications by petition, after a final decree in a cause for orders and provision with respect to the custody, maintenance, and education of children, the marriage of whose parents was the subject of the decree under the authority given to the Court by 22 & 23 Vict. cap. 61, section 4.

*Persons of Unsound Mind.*

196. A committee duly appointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a Petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a Respondent; but if no committee should have been appointed, application is to be made to one of the Registrars, who will assign a guardian to the person of unsound mind, for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf;

provided that if the opposite party is already before the Court when the application for the assignment of a guardian is made he or she shall be served with notice by summons of such application.

*Protection Orders.*

197. In the affidavit in support of an application on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the commencement of such desertion, the applicant must state whether she has any knowledge of the residence of her husband, and if he is known to be residing within the jurisdiction of the Court, he must be served personally with a summons to show cause why such order should not be made.

*Commission and Requisitions for Examination of Witnesses.*

198. The Registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order.

*Costs.*

199. The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the Registry of the Court of Probate, and shall not be delivered out or be sued upon without the order of the Court.

200. If more than one-sixth of the amount of any Bill of Costs taxed as between practitioner and client is disallowed on taxation thereof, the party on whose application the Bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the Bill as taxed, if so much remains due, otherwise the same shall be paid by the practitioner to the person on whose application the Bill is taxed.



201. The order for payment of costs of suit in which a Respondent or Co-Respondent has been condemned by a decree Nisi shall, if applied for before the decree Nisi is made absolute, direct the payment thereof into the Registry of the Court of Probate, and such costs shall not be paid out of the said Registry to the party entitled to receive them under the decree Nisi until the decree absolute had been obtained; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of Rule 159, obtained an order of the Judge Ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

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## ADDITIONAL RULES AND REGULATIONS

FOR

## DIVORCE AND MATRIMONIAL CAUSES.

### *Showing Cause against a Decree Nisi.*

202. When the Queen's Proctor desires to show cause against making absolute a Decree Nisi for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such Decree Nisi has been pronounced, and shall within fourteen days after entering appearance file his plea in the Registry, setting forth the grounds upon which he desires

to show cause as aforesaid, and on the day he files his plea in the Registry, shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing Rules and Regulations No. 68 and 69, in regard to the plea of the Queen's Proctor, filed after obtaining leave to intervene in a cause, and the existing Rules and Regulations from No. 70 to No. 76, both inclusive, shall no longer be applicable to the Queen's Proctor on his showing cause as aforesaid, save so far as regards any proceedings already commenced in pursuance of the said Rules and Regulations.

*Writs of Fieri Facias and other Writs.*

203. In default of payment of any sum of money at the time appointed by any order of the court for the payment thereof, a Writ of Fieri Facias or Writ of Sequestration or Writ of Elegit shall be issued as of course in the Registry upon an affidavit of service of the order and non-payment.

*Maintenance and Settlements.*

204. The Registrar to whom pleadings are referred for investigation under Rule 101, shall, if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in the same manner as on a reference for an allotment of alimony.

## DEBTORS ACT, 1869.

*Rules for regulating the Practice under and carrying into effect the First Part of the said Act.*

In pursuance of "the Debtors Act, 1869," it is ordered that, on and after the date mentioned at the foot of these Rules, the following Rules shall be in force for regulating the practice under and carrying into effect the first part of the said "Debtors Act, 1869."

1. All applications to commit to prison under Section 5 shall in the first instance be made by Summons before the Judge Ordinary, which shall specify the date and other particulars of the order for non-payment of which the application is made, together with the amount due, and be endorsed with the name and place of abode or office of business of the Proctor or Attorney actually suing out the Summons, and in case such Attorney shall not be an Attorney of this Court then also with the name and place of abode or office of business of the Attorney in whose name such Summons shall be taken out, and when the Attorney actually suing such Summons shall sue out the same as agent for an Attorney in the country, the name and place of abode of such Attorney in the country shall also be endorsed upon the said Summons, and in case no Attorney shall be employed to issue the Summons then it shall be endorsed with a Memorandum expressing that the same has been sued out by the Petitioner or Respondent or Co-respondent in person, as the case may be, mentioning the City, Town, or Parish, and also the name of the hamlet, street, and number of the house of such Petitioner's, Respondent's, or Co-respondent's residence, if any such there be.

2. The service of the Summons, whenever it may be practicable, shall be personal; but if it appear to the Judge Ordinary that reasonable efforts have been made to effect personal service, and either that the Summons has come to the knowledge of the Debtor, or that he wilfully evades

service, an order may be made as if personal service had been effected upon such terms as to the Judge Ordinary may seem fit.

3. Proof of the means of the Debtor shall, whenever practicable, be given by Affidavit, but if it appear to the Judge Ordinary either before or at the hearing that a vivâ voce examination, either of the Debtor or of any other person, or the production of any document, is necessary or expedient, an order may be made commanding the attendance of any such person before the Judge Ordinary at a time and place to be therein mentioned for the purpose of being examined on oath touching the matter in question (or and) for the production of any such document subject to such terms and conditions as to the Judge Ordinary may seem fit. The disobedience to any such order shall be deemed a Contempt of Court, and punishable accordingly.

4. The order of committal (which may be in the form A. in the Schedule or to the like effect) shall before delivery to the Sheriff be endorsed with the particulars required by Rule 1 of these Rules. Concurrent orders may be issued for execution in different counties. The Sheriff shall be entitled to the same fees in respect thereof as are now payable upon a Ca. sa.

5. Upon payment of the sum or sums mentioned in the order (including the Sheriff's fees in like manner as upon a Ca. sa.) the Debtor shall be entitled to a certificate in the form B. in the Schedule, or to the like effect, signed by the Proctor or Attorney in the Cause, of the Petitioner, Respondent, or Co-respondent, as the case may be, or signed by the Petitioner, Respondent, or Co-Respondent, as the case may be, and attested by an Attorney or Justice of the Peace.

6. The Sheriff or other officer named in an order of committal shall within two days after the arrest endorse on the order the true date of such arrest.

Dated this 15th day of February, 1870.

## SCHEDULE.

## A.

Upon hearing, &c. [*Christian and Surname of the Debtor and party claiming*] I do order, That the said *A.B.* be for default of payment of the debt herein-after mentioned committed to prison for the term of \_\_\_\_\_ weeks from the date of his arrest, including the day of such date, or until he shall pay £ \_\_\_\_\_, being the amount of [*here state the particulars of the debt or liability*], and which the said *A.B.* was on the \_\_\_\_\_ day of \_\_\_\_\_ ordered by the Court for Divorce and Matrimonial Causes to pay to the said \_\_\_\_\_ [or, into the Registry of the said Court], together with £ \_\_\_\_\_ for costs of this order, and Sheriff's fees for the execution thereof, and I order that the Sheriff of \_\_\_\_\_ do take the said *A.B.* for the purpose aforesaid, if he shall be found within his bailiwick.

Dated, &c.

## B.

I certify, That *A.B.*, now in the Gaol of \_\_\_\_\_ upon an order of the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, at the suit of *C.D.* for non-payment of a debt of \_\_\_\_\_ has satisfied the said debt, together with the costs mentioned in the said order.

Dated, &c.

*E.F.* of, &c.

Proctor or Attorney for the said *C.D.*,

or *C.D.* of, &c.

Witness to the Signature of *C.D.*,

*G.H.*, his Attorney,

or *I.K.*, Justice of the Peace for \_\_\_\_\_

(Signed)

PENZANCE.

Approved.

(Signed)

HATHERLEY, C.

February 15th, 1870.



Your Petitioner therefore humbly prays,—

That this Honourable Court will be pleased to decree :

*[Here set out the relief sought.]*

*[For instance]*, a dissolution of the said marriage and that the said *B.S.* do pay the sum of £                      as damages, by reason of his having committed adultery with the said *C.B.*

And that your Petitioner may have such further and other relief in the premises as to the Court may seem meet.

*[Petitioner's signature.]*

*[In a petition by the wife, the formal paragraphs alleging the marriage, cohabitation, birth of children, &c., are in the same form. Acts of adultery or cruelty must be stated clearly and concisely in separate paragraphs. Desertion must be alleged thus : "that on the day of                      the said C.B. deserted your petitioner, and has ever since lived separate and apart from her." The prayer may be : to decree a dissolution of the said marriage ; or : to decree a sentence of judicial separation ; and conclude as above.]*

The verifying affidavit is to be headed thus :—

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

In the matter of the petition of *A.B.*

I, *A.B.* of                      make oath and say as follows :—

*[Then set out the allegations of the petition, paragraph by paragraph in the first person, that is, those of which the petitioner has personal cognizance, viz., the marriage, &c., the cruelty or desertion ; and with respect to the adultery : That I am informed and verily believe, &c.]*

That no collusion or connivance exists between me and my said *[wife or husband]*.

Sworn by the said *A.B.* at, &c.

See Rule 142.

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No. 2.—*Citation.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

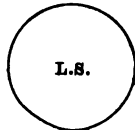
VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To C.B., of in the county of

WHEREAS A.B., of &c., claiming to have been lawfully married to has filed petition against in Our said Court, praying for wherein alleges that you have been guilty of adultery [*or have been guilty of cruelty towards the said or as the case may be*]:

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do appear in Our said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of Our said Court, is herewith served upon you. AND TAKE NOTICE, that in default of your so doing, Our said Court will proceed to hear the said charge [*or charges*] proved in due course of law, and to pronounce sentence therein, your absence notwithstanding. And take further notice, that for the purpose aforesaid you are to attend in person, or by your proctor, solicitor or attorney, at the Registry of Our said Court, London, and there to enter an appearance in a book provided for that purpose, without which you will not be allowed to address the Court, either in person or by counsel, at any stage of the proceedings in the cause.

Dated at London the day of , 18 , and in the year of Our Reign.



(Signed) X.Y., Registrar.



No. 3.—*Præcipe for Citation.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

Citation for *A.B.*, of                      against *C.B.*, of                      ,  
to appear in a suit for                      by reason of

(Signed) *A.B.* in person,

or

*C.D.*, proctor, solicitor, or  
attorney for the said *A.B.*

[Here insert the address required within three miles of  
the General Post Office.]

---

No. 4.—*Certificate of Service.*

This citation was duly served by the under-signed *G.H.* on  
the within-named *C.B.*, of                      at                      on  
the                      day of                      18 .

(Signed) *G.H.*

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No. 5.—*Affidavit of Service of Citation.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

*A.B.* against *C.B.* and *E.F.*

I, *C.D.*, of, &c., make oath and say,—

That the citation, bearing date the                      day of  
18                      , issued under seal of this Court  
against *C.B.* the Respondent [*or* Co-Respondent] in  
this cause and now hereunto annexed, marked with  
the letter A, was duly served by me on the said *C.B.*  
at                      in the county of, &c. by showing to  
h                      the original under seal, and by leaving with

h            a true copy thereof, on the            day of  
 18 . And I further make oath and say that I did  
 at the same time and place deliver to the said C.B.  
 personally a certified copy, under seal of this Court, of  
 the petition filed in this cause.

Sworn at, &c. on the            }  
                  day of            18 . Before me }

No. 6.—*Entry of an Appearance.*

In the Probate, Divorce, and Admiralty Division of Her  
 Majesty's High Court of Justice.

(DIVORCE.)

AB., Petitioner, against C.B., Respondent, and E.F., Co-Respondent.	}	The Respondent, C.B., appears in per- son [or C.D., the proctor, solicitor, or attorney for C.B., the Respondent (or E.F., the Co-Respondent), ap- pears for the said Respondent or Co-Respondent].
---	---	--

[Here insert the address required within three miles of  
 General Post Office.]

Entered this            day of            18 .

No. 7.—*Answer.*

In the Probate, Divorce, and Admiralty Division of Her  
 Majesty's High Court of Justice.

(DIVORCE.)

The            day of            18 .

A.B. v. C.B.

The Respondent, C.B., by C.D., her proctor, solicitor, or  
 attorney [or in person], in answer to the petition filed in this  
 cause, saith,—

1. That she denies that she committed adultery with E.S.,  
 as set forth in the said petition :

2. Respondent further saith, that on the                      day of  
    18 , and on other days between that day  
 and                      , the said *A.B.*, at                      in the county  
 of                      , committed adultery with *K.L.*

[*In like manner respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.*]

[Connivance or condonation may be pleaded consistently with a denial, thus :

That the Petitioner condoned the said adultery with  
*E.S.* if any.]

Wherefore this Respondent humbly prays,—

That the Court will be pleased to reject the prayer  
 of the said petition, and decree, &c.

[The verifying affidavit, except that it is to be headed  
 in the cause, *A.B. v. C.B.*, must be similar in form  
 to that in support of a petition.]

---

The Petitioner may reply as follows :

The Petitioner *A.B.* by                      his attorney, says:—

That he denies that he committed adultery with *K.L.* as  
 in the second paragraph of the answer alleged, and  
 joins issue thereon.

That even if he had condoned the said adultery of the  
 Respondent with the said *E.S.*, the same was revived by  
 the subsequent adultery of the Respondent with the  
 said *E.S.* [or with *G.H.* if adultery has been alleged  
 with more than one person] as set forth in the petition.

Wherefore the Petitioner prays as before.

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#### No. 8.—*Questions of fact for the Jury.*

In the Probate, Divorce, and Admiralty Division of Her  
 Majesty's High Court of Justice.

(DIVORCE.)

*A.B.* against *C.B.* and *E.F.*

*Questions for the Jury.*

1. Whether *C.B.*, the Respondent, committed adultery with *E.F.*, the Co-Respondent.
2. Whether *A.B.*, the Petitioner, has condoned the adultery committed by *C.B.*, the Respondent (if any).
3. Whether *A.B.*, the Petitioner, has been guilty of cruelty towards *C.B.*, the Respondent.

*[Here set forth in the same form all the questions at issue between the parties.]*

4. What amount of damages should be paid by *E.F.*, the Co-Respondent, in respect of the adultery (if any) by him committed.

---

No. 9.—*Act on Petition.*

To the Right Honourable the President of the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

*A.B.* against *C.B.* and *E.F.*

On the            day of            18 .

*A.B.*, the Petitioner [*or C.D.*, the proctor, solicitor, or attorney of *A.B.*, the Petitioner] alleged that

*[Here state briefly the facts and circumstances upon which the petition is founded.]*

Wherefore the said *A.B.*, or *C.D.*, referring to the affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that

*[Here set forth the prayer of the Petitioner.]*

(Signed)    *A.B.*  
                   *or*  
                   *C.D.*

*Answer.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

*A.B.* against *C.B.* and *E.F.*

On the            day of            18 .

*C.B.*, the Respondent [*or G.H.*, the proctor, solicitor, or attorney of *C.B.*, the Respondent] in answer to the allegations in the act on petition, bearing date the            day of 18 , of *A.B.*, admitted [*or denied*] that

[*Here set forth any allegations admitted or denied.*]

And he alleged that

[*Here state any facts or circumstances in explanation or in answer.*]

Wherefore the said *C.B.* or *G.H.*, referring to the affidavits and proofs to be by her exhibited in verification of what she so alleged, prayed

[*Here state the prayer of the Respondent.*]

(Signed)    *C.B.*

*or*

*G.H.*

*Conclusion.*

*A.B.* against *C.B.* and *E.F.*

On the            day of            18 .

*A.B.*, the Petitioner [*or C.D.*, the proctor, solicitor, or attorney for *A.B.*, the Petitioner] in reply to the allegations of *C.B.* [*or G.H.*] in her answer, bearing date            denied the same in great part to be true or relevant. Wherefore he alleged and prayed as before.

(Signed)    *A.B.*

*or*

*C.D.*

---

No. 10.—*Petition for Reversal of Decree.*

To the Right Honourable the President of the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE).

The            day of            18   .  
The petition of *A.B.*, of            , sheweth,—

1. That your Petitioner was on the            day of  
18   , lawfully married to *C.B.*, then *C.D.*, Spinster  
[or Widow] at the Parish of, &c.

[*Here state where the marriage took place.*]

2. That on the            day of            your  
Lordship, by your final decree, pronounced in a cause  
then depending in this Court, entitled *C.B.* against  
*A.B.*, decreed as follows; to wit:

[*Here set out the decree.*]

3. That the aforesaid decree was obtained in the absence  
of your Petitioner, who was then residing at

[*State facts tending to show that the Petitioner did not  
know of the proceedings; and further, that had he  
known of them he might have offered a sufficient  
defence.*]

or,

That there was reasonable ground for your Petitioner  
leaving his said wife

[*Here state any legal grounds justifying the  
Petitioner's separation from his wife.*]

Your Petitioner therefore humbly prays,—

That the Court will be pleased to reverse the said  
decree.

No. 11.—*Appeal.*

I *A.B.* the Petitioner [or *C.D.* the proctor, solicitor, or  
attorney of *A.B.* the Petitioner], in a suit lately depending  
in Her Majesty's Court for Divorce and Matrimonial Causes,

entitled *A.B.* against *C.D.* and *E.F.*, do hereby, in due time and place, complain of and appeal against a certain order or decree made in the said cause by the Right Honourable the Judge of the said Court on the                      day of 18     . Whereby, amongst other things, the said Judge did order and decree [*here set forth the whole of the decree, or such part of it as may be appealed against.*]

(Signed)     *A.B.*  
                         or  
                         *C.D.*

This instrument of appeal was lodged in the Registry of Her Majesty's Court for Divorce and Matrimonial Causes this                      day of                      18     .

*To be signed by a Clerk in the Registry.*

---

No. 12.—*Affidavit in support of Motion for Decree absolute.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE).

*A.B.* against *C.B.* and *E.F.*

I *C.D.* of &c., solicitor for *A.B.* the Petitioner in this cause, make oath and say, that on the                      day of 18     , I carefully searched the books kept in the Registry of the Court for the purpose of entering appearances, from and including the day of 18     , the day of the date of the decree nisi made in this cause, to the                      day of 18     , and that during such period no appearance has been entered in the said books by Her Majesty's Procurator General, or by or on behalf of any other person or persons whomsoever. And I further make oath and say, that I have also carefully searched the books kept in the said Registry for entering the minutes of proceedings had in this cause from and including the said day of 18     , to the                      day of

Sworn at &c., on the                      day of }  
18     . Before me }

(DIVORCE).

1. That the said *A.B.* does now carry on and has for many years past carried on the business of a \_\_\_\_\_ at \_\_\_\_\_, and from such business he derives the net annual income of £ \_\_\_\_\_ :
2. That the said *A.B.* is now or lately was possessed of or entitled to \_\_\_\_\_ proprietary shares of the \_\_\_\_\_ Railway Company, amounting in value to £ \_\_\_\_\_, and yielding a clear annual dividend of £ \_\_\_\_\_ :
3. That the said *A.B.* is possessed of certain stock-in-trade in his said business of a \_\_\_\_\_ of the value of £ \_\_\_\_\_.

*[In same manner state particulars of any other property which the husband may possess.]*



Your Petitioner therefore humbly prays,—

That the Court will be pleased to decree her such sum or sums of money by way of alimony pendente lite [*or permanent alimony*] as to the Court shall seem meet.

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No. 14.—*Election of a Guardian.*

*By a Petitioner.*

Whereas a suit is about to be instituted in Her Majesty's Court for Divorce and Matrimonial Causes on behalf of *A.B.* against *C.B.*, the wife of the said *A.B.* and *E.F.* And whereas the said *A.B.* is now a minor of the age of \_\_\_\_\_ years and upwards, but under the age of 21 years, and therefore by law incapable of acting in his own name.

Now I the said *A.B.* do hereby make choice and elect *G.H.*, my natural and lawful father and next of kin, to be my curator or guardian for the purpose of carrying on and prosecuting the same until a final decree shall be given and pronounced therein, or until I shall attain the age of twenty-one years, and I hereby appoint *C.D.*, of &c., my proctor [*solicitor or attorney*] to file or cause to be filed this my election for me in the Registry of the said Court.

In witness whereof I have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_ in the year 18 \_\_\_\_\_.

(Signed) *A.B.* (L.S.)

Signed, sealed, and delivered by the within  
named *A.B.* in the presence of

*One attesting witness.*

*By a Respondent.*

Whereas a citation bearing date the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ has issued under seal of Her Majesty's Court for Divorce and Matrimonial Causes, at the instance of *A.B.*, claiming to have been lawfully married to *C.B.*, citing the said *C.B.* to appear in the said Court, and then and there to make answer to a certain petition of the

said *A.B.* filed in the said Court. And whereas the said *C.B.* is now a minor of the age of                      years and upwards, but under the age of twenty-one years, and therefore by law incapable of acting in her own name.

Now I the said *C.B.* do hereby make choice of and elect *G.H.*, my natural and lawful father and next of kin, to be my curator or guardian for the purpose of entering an appearance for me and on my behalf in the said Court, and for the purpose of making answer for me to the said petition, and of defending me in the said cause, and to abide for me in judgment until a final decree shall be given and pronounced therein, or until I shall attain the age of twenty-one years, and I hereby appoint, &c.

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No. 15.—*Subpcena ad testificandum*.\*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to [*names of all witnesses included in the subpoena to be inserted*], Greeting. We command you and every of you to be and appear in your proper persons before [*insert the name of the Judge*], Judge of Our Court for Divorce and Matrimonial Causes, at Westminster, in Our County of Middlesex, on                      the                      day of                      , 18                      , by eleven of the clock in the forenoon of the same day, and so from day to day, whenever Our said Court is sitting, until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in Our said Court before Our said Judge depending between *A.B.*, Petitioner, and *C.B.*, Respondent, and *E.F.*, Co-Respondent, on the part of the Petitioner [*or Respondent, or Co-Respondent or, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of

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\* This Form was substituted for the former one by the additional rule, 180, of 1869.

each of you of £100. Witness [*insert the name of the Judge*],  
at the Court for Divorce and Matrimonial Causes, the  
day of 18 in the year of Our  
reign.

(Signed) X.Y., Registrar.

N.B.—Notice will be given to you of the day on which  
your attendance will be required.

---

No. 16.—*Præcipe for Subpœna ad testificandum.*

In the Probate, Divorce, and Admiralty Division of Her  
Majesty's High Court of Justice.

(DIVORCE.)

Subpœna for [*insert witnesses' names*], to testify between  
A.B., Petitioner, O.B., Respondent, and E.F., Co-Re-  
spondent, on the part of the Petitioner [*or Respondent or*  
Co-Respondent].

(Signed)  $\left\{ \begin{array}{l} \text{A.B.} \\ \text{C.D.} \\ \text{E.F.} \end{array} \right\} \text{ or } \left\{ \begin{array}{l} \text{P.A., Petitioner's [or Re-} \\ \text{spondent's or Co-Respon-} \\ \text{dent's]} \text{ proctor, solicitor,} \\ \text{or attorney.} \end{array} \right.$

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No. 17.—*Subpœna duces tecum.\**

VICTORIA, by the grace of God of the United Kingdom of  
Great Britain and Ireland, Queen, Defender of the Faith, to  
[*names of all parties included in the subpœna to be inserted*],  
Greeting. We command you and every of you to be and  
appear in your proper persons before [*insert the name of the*  
*Judge*], Judge of Our Court for Divorce and Matrimonial  
Causes, at Westminster, in Our County of Middlesex, on  
the day of 18, by eleven  
of the clock in the forenoon of the same day, and so from day  
to day whenever Our said Court is sitting, until the cause or

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\* This Form was substituted for the former one by the additional rule,  
180, of 1869.

proceeding is heard, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c. required to be produced*], then and there to testify and show all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain cause or proceeding now in Our said Court before Our said Judge depending between *A.B.*, Petitioner, and *C.B.*, Respondent, and *E.F.*, Co-Respondent, on the part of the Petitioner [*or the Respondent or Co-Respondent, as the case may be*], and on the aforesaid day between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of £100. Witness [*insert the name of the Judge*], at Our Court for Divorce and Matrimonial Causes, the                      day of                      18                      , in the year of Our reign.

(Signed)                      X.Y., Registrar.

N.B.—Notice will be given to you of the day on which your attendance will be required.

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No. 18.—*Præcipe for Subpœna duces tecum.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

Subpœna for                      to testify and produce, &c. between *A.B.*, Petitioner, *C.B.*, Respondent, and *E.F.*, Co-Respondent, on the part of the Petitioner [*or Respondent or Co-Respondent*].

(Signed)                       $\left\{ \begin{array}{l} \text{A.B.} \\ \text{C.B.} \\ \text{E.F.} \end{array} \right\}$  or                       $\left\{ \begin{array}{l} \text{P.A., Petitioner's [or Re-} \\ \text{spondent's or Co-Respon-} \\ \text{dent's]} \text{ proctor, solicitor,} \\ \text{or attorney.} \end{array} \right\}$

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No. 19.—*Application for a Protection Order.*

To the Right Honourable the President of the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

The application of *C.B.*, of \_\_\_\_\_, the lawful wife of *A.B.*, sheweth,—

That on the \_\_\_\_\_ day of \_\_\_\_\_ she was lawfully married to *A.B.* at \_\_\_\_\_ :

That she lived and cohabited with the said *A.B.* for \_\_\_\_\_ years at \_\_\_\_\_, and also at \_\_\_\_\_, and hath had \_\_\_\_\_ children, issue of her said marriage, of whom \_\_\_\_\_ are now living with the applicant, and wholly dependent upon her earnings :

That on or about \_\_\_\_\_ the said *A.B.* without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her :

That since the desertion of her said husband the applicant hath maintained herself by her own industry, and hath thereby and otherwise acquired certain property [or hath become possessed of certain property], consisting of [*here state generally the nature of the property*].

Wherefore the said *C.B.* prays an Order for the protection of her earnings and property acquired since the said day of \_\_\_\_\_, from the said *A.B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

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No. 20.—*Commission or Requisition for Examination of Witnesses.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to

[*here set forth the name and proper description of the Commissioner*], Greeting. Whereas a certain cause is now depending in Our Court for Divorce and Matrimonial Causes between *A.B.*, Petitioner, and *C.B.*, Respondent, and *E.F.*, Co-Respondent, wherein the said *A.B.* has filed his petition praying for a dissolution of his marriage with the said *C.B.* [*or otherwise as in the prayer of the petition*]. And whereas by an order made in the said cause on the                      day of                      18                      on the application of the said *A.B.*, it was ordered that a Commission [*or Requisition*] should issue under Seal of Our said Court for the examination of [*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said *A.B.*, the Petitioner, in support of his said petition (saving all just exceptions). Now know ye that We do by virtue of this Commission [*or Requisition*] to you directed, authorize [*or request*] you within thirty days after the receipt of this Commission [*or Requisition*] at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them by you touching the matters set forth in the said petition (a true and authentic copy whereof sealed with the seal of Our said Court is hereunto annexed) and such oath being administered We do hereby authorize [*or request*] and empower you to take the examination of the said witnesses, touching the matters set forth in the said petition, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid and subscribed by you We do require [*or request*] you forthwith to transmit the said examination, closely sealed up, to the Registry of Our said Court in Doctors Commons in the City of London together with these presents. And We do hereby give you full power



2. That at the time of such ceremony your Petitioner was about                      years of age, and the said *J.C.* was about                      years of age.

3. That after the said ceremony of marriage your Petitioner lived and cohabited with the said *J.C.* at                      , in the County of                      and that your Petitioner was always apt and willing to receive the conjugal embraces of the said *J.C.* but that nevertheless the said marriage has never been consummated.

4. That the said *J.C.* was at the time of the said marriage and has ever since been wholly unable to consummate the said marriage by reason of the malformation of his parts of generation, and that such malformation is incurable by art or skill.

5. That the said *J.C.* was at the time of the said marriage and has ever since been wholly unable to consummate the same by reason of the frigidity and impotence of his parts of generation, and that such frigidity and impotence are incurable by art or skill.

Your Petitioner therefore humbly prays that this Honourable Court will be pleased to declare that the marriage in fact, but illegally celebrated on the                      day of                      , 18                      , between your Petitioner and the said *J.C.* was and is null and void, and that your Petitioner is free from all bond of marriage with the said *J.C.*, and to declare that the said *J.C.* do pay the costs of and incident to this petition, &c.

And your Petitioner, &c., &c.

(2.)

*Answer to the foregoing Petition.*

In the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(DIVORCE.)

*O. v. C.*

The                      day of                      , 18                      .

The Respondent *J.C.* by                      , his solicitor, for answer to the petition filed in this cause, saith—



1. That the said Petitioner was not at any time since the said marriage apt and willing to receive the conjugal embraces of the Respondent, but although he was always since the said marriage ready and willing to consummate the said marriage, she always refused to permit him to consummate and hindered him from consummating the same.

2. That the Respondent always has been able and willing to consummate the said marriage, and never had any such malformation, frigidity, or impotence as in the said petition is alleged.

Wherefore the Respondent humbly prays that this Honourable Court will be pleased to reject the prayer of the said petition.

And the Respondent, &c.

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(3.)

*Petition by husband for decree of nullity of marriage by reason of the woman's unfitness.*

To the Right Honourable the President, &c., &c.

(DIVORCE.)

The petition of *J. T.*, of

Sheweth,—

1. That on the first day of April, 18     , a ceremony of marriage was in fact though illegally had between your Petitioner and *A.O.*, falsely called *A.T.*, at the parish church of

2. That after the said ceremony of marriage and until the day of     your Petitioner lived and cohabited with the said *A.T.* at, &c., &c., but by reason of the malformation of the parts of generation of the said *A.T.* your Petitioner was on the said first day of April, 18     , and has ever since continued unable to consummate his said marriage.

3. That such the malformation of the parts of generation of the said *A.T.* is incurable by art or skill, as upon inspection by experts will appear.

4. That your Petitioner is competent and fit to have sexual intercourse, as on inspection by experts will appear.

The Petitioner therefore humbly prays that this Honourable Court will be pleased to declare that the marriage in fact, though illegally celebrated on the first day of April, 18 , between the Petitioner and the said A.T., was and is null and void, and that the Petitioner is free from all bond of marriage with the said A.T., and to decree that the Petitioner may have such further and other relief in the premises as to the Court may seem meet.

And the petitioner, &c., &c.

(4.)

*Petition by husband for restitution of conjugal rights.*

To the Right Honourable the President, &c., &c.

(DIVORCE.)

The                      day of                      , 18                      .

The petition of J. S., of  
Sheweth,—

1. That your Petitioner on the                      day of                      , 18                      , married his present wife, whose then name was C., at                      , in the parish of                      , in the County of                      .

2. That from and after that marriage your Petitioner lived and cohabited with his said wife at divers places, and particularly at                      , in the County of                      , until the                      day of                      , 18                      , with the exception of an interval of rather more than seven weeks between the                      day of                      and the                      day of                      , during which said interval your Petitioner's said wife resided with her aunt at                      , in the County of                      .

3. That your Petitioner, after the said                      day of                      , 18                      , resided for three weeks

with his father at \_\_\_\_\_, in the said County of Middlesex, and that your Petitioner has resided at \_\_\_\_\_ from that time until the date of this petition.

4. That your Petitioner's said wife has since the day of \_\_\_\_\_, 18\_\_\_\_, without any just cause, refused and still refuses to live and cohabit with him and to render him conjugal rights.

Your Petitioner therefore humbly prays that this Honourable Court will be pleased to declare that your Petitioner did on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, marry the said \_\_\_\_\_, and to order that the said \_\_\_\_\_ do return home to the Petitioner and render him conjugal rights; and that your Petitioner may have such further and other relief in the premises as to this Honourable Court may seem fit.

And your Petitioner, &c., &c.

---

T A B L E   O F   F E E S

T O   B E   T A K E N   I N

T H E   C O U R T   F O R   D I V O R C E   A N D

M A T R I M O N I A L   C A U S E S .

---

WHEREAS by an Act passed in the Session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, chapter 85, it is provided that there shall be a Court of Record, to be called "The Court for Divorce and Matrimonial Causes;" and whereas by the said Act it is further provided, that the said Court shall have full power to fix and regulate from time to time the Fees payable upon all proceedings before it; and whereas by another Act passed in the Session of Parliament holden in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter 144, it is enacted that it shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to exercise all powers and authority whatever thencefore exercised by the full Court.

Now I, Sir James Plaisted Wilde, Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes, do fix the Fees set forth in the annexed Table to be payable upon proceedings in the said Court for Divorce and Matrimonial Causes on and after the 11th January, 1866.

Dated the 11th January, 1866.

(Signed) JAMES PLAISTED WILDE.

TABLE OF FEES  
TO BE TAKEN IN THE  
COURT FOR DIVORCE AND MATRIMONIAL  
CAUSES.

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*Citation.*

	£	s.	d.
On every citation . . . . .	0	5	0
For settling citation, or an abstract thereof for advertisement, or other advertisement :			
If five folios of seventy-two words or under . . . . .	0	2	6
If above five folios for each additional folio or part of a folio . . . . .	0	0	3

*Appearance.*

On entering appearance . . . . .	0	2	6
On amending appearance . . . . .	0	2	6

*Pleadings.*

Filing a petition . . . . .	0	5	0
Filing an answer . . . . .	0	5	0
Filing a reply . . . . .	0	5	0
Filing rejoinder or any further replication . . . . .	0	5	0
Filing act on petition . . . . .	0	5	0
Filing any writing to the act on petition by way of answer, reply, rejoinder, or conclusion . . . . .	0	5	0
Filing joinder in demurrer . . . . .	0	5	0
On amending or reforming pleadings . . . . .	0	2	6

*Evidence.*

Filing interrogatories (each set) . . . . .	0	5	0
Filing deposition of each witness . . . . .	0	2	6

*Protection Orders.*

	£	s.	d.
Filing application for an order for the protection of a wife's earnings and property . . . . .	0	5	0
For entering the order on such application . . . . .	0	5	0
For the order under seal of the Court . . . . .	0	10	0

*Questions for Jury.*

For settling the issues of fact to be tried by a jury	0	10	0
Filing parchment copy of issues of fact as settled .	0	2	6
Filing panel . . . . .	0	2	6

*Setting down.*

Setting a cause down for hearing or trial . . . . .	0	5	0
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*Withdrawal.*

On withdrawal of a cause after same is set down for hearing or trial, to be paid by the party at whose instance it is withdrawn . . . . .	0	5	0
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*Subpœna.*

On every subpoena . . . . .	0	2	6
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*Hearing or Trial.*

On the hearing or trial of a cause :			
From the party setting down the cause for hearing or trial . . . . .	1	10	0
If the hearing or trial continues more than one day, for each day :			
From the same party . . . . .	1	0	0

*Judge's Notes.*

Producing the Judge's notes . . . . .	0	5	0
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*Entering Decree, Verdict, or Order.*

Entering sentence or final decree in a cause, to be paid by the successful party . . . . .	0	10	0
Entering verdict, if five folios of seventy-two words or under . . . . .	0	5	0

	£.	s.	d.
If exceeding five folios, for each additional folio or part of a folio . . . . .	0	1	0
Entering order for the examination of a witness or witnesses . . . . .	0	5	0
Entering any decree or order for alimony . . . . .	0	5	0
Entering order directing how damages shall be applied . . . . .	0	5	0
Entering order providing for custody, maintenance or education of children, if five folios of seventy-two words or under . . . . .	0	5	0
Entering any order made under the authority given by 20 & 21 Vict. c. 85, sections 32 and 45, and by 22 and 23 Vict. c. 61, s. 5, if five folios of seventy-two words or under . . . . .	0	5	0
If either of the above orders exceed five folios, for each additional folio or part of a folio . . . . .	0	1	0
Entering any minute, order, or decree in the Court Book other than minutes, orders, or decrees specified . . . . .	0	2	6
Entering any order of the Registrars of the Court of Probate the same fee as would be payable for entering a similar order made by the Judge.			

*Orders.*

For any order issuing under the hand of the Judge Ordinary or of one or more of the Registrars, except orders made on summons . . . . .	0	5	0
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*Bill of Exceptions.*

Bill of exceptions signed by the Judge . . . . .	0	5	0
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*Commission or Requisition.*

On every commission or requisition issuing under seal of the Court . . . . .	1	0	0
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*Taking Evidence.*

For taking the evidence of one or more witnesses

	£.	s.	d.
before the Registrar, and within three miles of the General Post Office, for each day . . .	3	3	0
If beyond that distance, for each day, in addition to travelling expenses . . .	5	5	0
If for part of a day only, such smaller fee as the Registrar in his discretion shall think proper.			

*References to the Registrars.*

On each reference to ascertain the amount to be paid or secured to a wife to cover her costs. For the Registrar's attendance . . .	0	5	0
For his report thereon . . .	0	2	6
On each reference for any other inquiry before the Registrars. For Registrar's attendance . . .	1	0	0
For every hour or part of hour after the first hour a further fee of . . .	0	10	0
For the Registrar's report, if five folios of seventy-two words or under . . .	0	5	0
If exceeding five folios, for every additional folio or part of a folio . . .	0	2	0

*Summonses.*

On each summons . . .	0	2	6
For an order on summonses, including the entry of same . . .	0	2	6
If a final order in the cause . . .	0	10	0

*Motions.*

Filing case for motion . . .	0	5	0
Entering any minute or order on motion other than orders specified . . .	0	5	0
If a final order in the cause . . .	0	10	0

*Writs.*

Writ of attachment . . .	0	7	6
Writ of sequestration . . .	1	0	0
Writ of fieri facias . . .	1	0	0



*Appeals.*

	£	s.	d.
On lodging instrument of appeal . . . . .	0	10	0

*Certificate.*

For every certificate under the hand of the Judge Ordinary, or of one of the Registrars of the Principal Registry of the Court of Probate . . . . .	0	2	6
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*Filing.*

Filing every notice . . . . .	0	1	0
Filing exhibits, for each exhibit . . . . .	0	1	0
Filing every affidavit or other document brought into Court or deposited in the Registry for filing which no fee is before specified . . . . .	0	2	6

*Searches.*

Search in each Court Book, if within the last five years . . . . .	0	1	0
If at an earlier period than within the last five years . . . . .	0	2	6
In case the Court Books to be searched or the documents required are not in the Registry, in addition to the above . . . . .	0	2	6

*Office Copies and Extracts.*

For every office copy or extract of a minute, order, or decree entered in a cause, or of any document filed in a cause, or deposited in the Registry :			
If five folios of seventy-two words or under . . . . .	0	2	6
If exceeding five folios of seventy-two words, per folio . . . . .	0	0	6
If on parchment, in addition to the above, for every folio and part of a folio of seventy-two words . . . . .	0	0	3
For the seal of the Court affixed to any minute, order, or decree, or to any office copy . . . . .	0	5	0

*Taxing Costs.*

Taxing every bill of costs :			
If five folios of seventy-two words or under . . . . .	0	2	6

## TABLE OF FEES.

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	£	s.	d.
If exceeding five folios of seventy-two words			
When taxed as between party and party, for every folio and part of a folio of seventy-two words	0	0	6
When taxed as between practitioner and client, for every folio and part of a folio of seventy-two words	0	1	0
For postponement of appointment for taxation of costs to be paid by the party at whose instance the appointment is postponed :			
If the bill of costs is five folios of seventy-two words or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0

*Appointment of Officers.*

On appointment of a Commissioner for taking oaths	1	0	0
For registering appointment of a Commissioner for taking oaths in the Court of Chancery	0	5	0

*Oaths.*

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For marking each exhibit	0	1	0

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FINIS.

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1. The first part of the document is a list of names and addresses of the members of the committee.

